

CLERK'S COPY,

TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

(October Term, 1944)

No. 22

THE UNITED STATES OF AMERICA, PETITIONER

vs.

FRANKFORT DISTILLERS, INC.

No. 23

THE UNITED STATES OF AMERICA, PETITIONER

vs.

NATIONAL DISTILLERS PRODUCTS CORPORATION

No. 24

THE UNITED STATES OF AMERICA, PETITIONER

vs.

BROWN FURMAN DISTILLERS CORPORATION

No. 25

THE UNITED STATES OF AMERICA, PETITIONER

vs.

HIRAM WALKER, INCORPORATED

No. 26

THE UNITED STATES OF AMERICA, PETITIONER

vs.

SCHEMERY DISTILLERS CORPORATION

No. 27

THE UNITED STATES OF AMERICA, PETITIONER

vs.

DIAGRAM DISTILLERS CORPORATION

No. 28

THE UNITED STATES OF AMERICA, PETITIONER

vs.

ROBINSON & ROBBINS, INCORPORATED

No. 29

THE UNITED STATES OF AMERICA, PETITIONER

vs.

J. E. SPENCER

PETITION FOR CERTIORARI FILED SEPTEMBER 30, 1944  
CERTIORARI GRANTED NOVEMBER 13, 1944





# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 523

THE UNITED STATES OF AMERICA, PETITIONER

vs.

FRANKFORT DISTILLERIES, INC.

No. 524

THE UNITED STATES OF AMERICA, PETITIONER

vs.

NATIONAL DISTILLERS PRODUCTS CORPORATION

No. 525

THE UNITED STATES OF AMERICA, PETITIONER

vs.

BROWN FORMAN DISTILLERS CORPORATION

No. 526

THE UNITED STATES OF AMERICA, PETITIONER

vs.

HIRAM WALKER, INCORPORATED

No. 527

THE UNITED STATES OF AMERICA, PETITIONER

vs.

SCHENLEY DISTILLERS CORPORATION

No. 528

THE UNITED STATES OF AMERICA, PETITIONER

vs.

SEAGRAM-DISTILLERS CORPORATION

No. 529

THE UNITED STATES OF AMERICA, PETITIONER

vs.

McKESSON & ROBBINS, INCORPORATED

No. 530

THE UNITED STATES OF AMERICA, PETITIONER

vs.

J. E. SPEEGLE

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A [Caption omitted.]

1 In the United States District Court for the District of  
Colorado Sitting at Denver

Criminal No. 9514

UNITED STATES OF AMERICA, PLAINTIFF

v.

HIRAM WALKER, INCORPORATED; SEAGRAM-DISTILLERS CORPORATION;  
SCHENLEY DISTILLERS CORPORATION; FRANKFORT DISTILLERS, IN-  
CORPORATED; MCKESSON & ROBBINS, INCORPORATED; NATIONAL  
DISTILLERS PRODUCTS CORPORATION; BROWN FORMAN DISTILLERS  
CORPORATION, J. E. SPEEGLE; ET AL., DEFENDANTS

*Order on indictment*

March 12, 1942

In the Matter of The Grand Jury. Indictments Returned.

At this day comes Walter Kley, Foreman, together with the  
members of the Grand Jury, heretofore duly empanelled and  
sworn as grand jurors and file with the clerk of the court the record  
of the grand jurors concurring in the finding of each and every  
indictment, and return into court now here the following endorsed  
true bills of indictment and not true bills of indictment, to wit:

\* \* \* \*

Thereupon, it is ordered by the court that summons issue herein  
directed to the defendants \* \* \* Hiram Walker, Inc.; Sea-  
gram-Distillers Corporation; Schenley Distillers Corpo-  
2 ration; Brown-Forman Distillers Corporation; Frankfort  
Distillers, Inc.; National Distillers Products Corporation;  
McKesson & Robbins, Inc.; \* \* \* commanding that they ap-  
pear before this court to answer to said indictment within twenty  
(20) days after the service of such summons.

And thereupon, it is ordered by the court that bench warrants  
issue without delay against all individual defendants and return-  
able forthwith, and that the defendants be let to bail before an  
United States Commissioner, for their appearance in this court  
from day to day and from term to term to answer unto the indict-  
ment herein, in the amounts set opposite their names.

In United States District Court

*Indictment*

Filed March 12, 1942

The Grand Jurors of the United States of America, duly im-  
paneled, sworn, and charged in the District Court of the United

States for the District of Colorado at the November, 1941, term of said Court, inquiring within and for the said District at said term of said Court, do upon their oaths find and present as follows, to wit:

### COUNT ONE

#### I. Period of Time Covered by This Count

1. Each of the allegations hereinafter contained in this count shall be deemed to refer to the period of time beginning in or about the month of June, 1935, the exact date being to the Grand Jurors unknown, and continuing thereafter up to and including the date of the presentation of this indictment, unless otherwise expressly stated.

#### II. Definitions

2. Whenever the term "spirituous liquor" shall be used in this indictment it shall be deemed to mean alcoholic beverages, of whatever description, containing 24% or more of alcohol, by volume.

3. Whenever the term "alcoholic beverages" is used in this indictment it shall be deemed to mean spirituous liquor, wine, and beer.

3 4. Whenever the term "producers" is used in this indictment it shall be deemed to mean persons, partnerships, and corporations engaged in manufacturing, distilling, fermenting, brewing, rectifying, processing, or importing any alcoholic beverage, or any parent, subsidiary, or affiliated corporation thereof engaged in the sale of the products of such person, partnership, or corporation.

5. Whenever the term "wholesalers" is used in this indictment it shall be deemed to mean persons, partnerships, and corporations doing business in the State of Colorado engaged, in whole or in part, in the purchase of alcoholic beverages for resale to retailers.

6. Whenever the term "retailers" is used in this indictment it shall be deemed to mean persons, partnerships, and corporations doing business in the State of Colorado engaged, in whole or in part, in the sale and distribution of alcoholic beverages in bottles and by the case to the consuming public.

7. Whenever the term "wholesale prices" is used in this indictment it shall be deemed to mean prices charged for alcoholic beverages sold by wholesalers to retailers.

8. Whenever the term "retail prices" is used in this indictment it shall be deemed to mean prices charged for alcoholic beverages sold by retailers to the consuming public.



9. Whenever the term "wholesale discount" is used in this indictment it shall be deemed to mean a discount for quantity purchases and the like allowed from or upon the wholesale price.

### III. The Defendants

10. The Colorado Wholesale Wine and Liquor Dealers Association, Inc. (hereinafter sometimes designated as the Wholesale Association), is hereby indicted and made a defendant herein. Said Association is a corporation organized and existing under the laws of the State of Colorado, with its principal place of business in Denver, Colorado. The membership of said Association is composed of wholesalers doing business as such within the State of Colorado.

11. The Colorado Package Liquor Association, Inc. (hereinafter sometimes referred to as the Package Association), is hereby indicted and made a defendant herein. Said Association is a corporation organized and existing under the laws of the State of Colorado, with its principal place of business in Denver, Colorado. The membership of said Association is composed of retailers doing business as such within the State of Colorado. Said defendant Package Association and defendant Wholesale Association are sometimes referred to as "defendant associations."

12. The following named corporations are hereby indicted and made defendants herein. Each is a corporation doing business as a producer, organized and existing under the laws of the State, and having its principal offices at the city indicated below. These defendants will sometimes hereinafter be referred to as "defendant producers."

Name of producer	State of incorporation	Principle offices
Hiram Walker Incorporated	Delaware	Detroit, Michigan
Sesnam-Distillers Corporation	Delaware	New York, New York
Waterfall & Frazier Distillery Company	Missouri	Kansas City, Missouri
Schenley Distillers Corporation	Delaware	New York, New York
Gooderham & Worts, Limited	Delaware	Detroit, Michigan
Jas. Barclay & Co., Limited	Delaware	Detroit, Michigan
Ben-Burk, Inc	Massachusetts	Boston, Massachusetts
Brown Foreman Distillers Corporation	Delaware	Louisville, Kentucky
Calvert-Distillers Corporation	Maryland	New York, New York
Frankfort Distilleries, Incorporated	West Virginia	Louisville, Kentucky
Glenmore Distillers Company	Kentucky	Louisville, Kentucky
National Distillers Products Corporation	Virginia	New York, New York
The Fleischmann Distilling Corporation	New York	New York, New York
William Jameson & Co., Inc	Delaware	New York, New York
D. J. Bielzoff Products Company	Illinois	Chicago, Illinois
Garrett & Company, Incorporated	New York	Brooklyn, New York
The American Distilling Company	Maryland	New York, New York
Somerset Importers, Ltd.	Delaware	New York, New York
East-Side Winery	California	Los Angeles, California

**4 UNITED STATES VS. FRANKFORT DISTILLERIES, INC., ET AL.**

The following named corporations are hereby indicted and made defendants herein. Each is a corporation doing business as a wholesaler, organized and existing under the laws of the State, and having its principal offices at the city, indicated below. Certain of these corporations, as indicated below, are members of defendant Wholesale Association:

Name of corporation	State of incorporation and principal offices	
Reuter-Lewin, Inc .....	Colorado—Denver, Colorado	Member, Wholesale Association.
Davis Bros., Inc .....	Colorado—Denver, Colorado	Member, Wholesale Association.
Liquors, Inc .....	Colorado—Denver, Colorado	Member, Wholesale Association.
A. Carbone and Company, Inc .....	Colorado—Denver, Colorado	Member, Wholesale Association.
McKesson & Robbins, Inc .....	Maryland—New York, New York	Member, Wholesale Association.
Colorado Beverage Company .....	Colorado—Denver, Colorado	Member, Wholesale Association.
The C. D. Smith Drug Co .....	Colorado—Grand Junction, Colorado	Member, Wholesale Association.
Colorado Alcohol Company .....	Colorado—Denver, Colorado	

**6**      **14.** The following named individuals are hereby indicted and made defendants herein. Each of the said individuals is or has been associated, in the capacity indicated below, with one of the defendant associations or with one of the defendant corporations other than the defendant associations, or both, as indicated below. Said individual defendants, during the period covered by this indictment and within three years next preceding the date of its presentation, have been actively engaged in the management, direction, or operation of the affairs, policies, and activities of the respective defendant organizations with which they are or have been associated, as indicated below, particularly those affairs, policies, and activities of the said defendant organizations described in this indictment:

7 Name of individual	Residence	Business affiliation	Organization affiliation
Burg, Morris L.	Denver, Colo	President, Liquors, Inc	Director, Wholesale Association.
Carbone, John A.	Denver, Colo	President, A. Carbone and Company, Inc	Director and Ex-President, Wholesale Association.
Carroll, Edward J.	Denver, Colo	Employee, Davis Bros. Inc	Ex-Director, Wholesale Association.
Davis, John C.	Denver, Colo	President and General Manager, Davis Bros., Inc	Ex-President, Wholesale Association.
Reuler, George C.	Denver, Colo	President, Reuler-Lewin, Inc	Director and Treasurer, Wholesale Association.
Rothberg, Abraham	Denver, Colo	Employee, Sarah Zerobnick, doing business as Midwest Liquor Company	Director, Wholesale Association.
Stenzel, Raymond O.	Denver, Colo	Manager, Liquor Sales, McKesson & Robbins, Incorporated.	Director and Ex-Secretary, Wholesale Association.
Wheat, George M.	Denver, Colo		Ex-Executive Secretary, Package Association.
Zerobnick, Joseph	Denver, Colo	Employee, Sarah Zerobnick, doing business as Midwest Liquor Company	Representative to Wholesale Association.
8 Campbell, E. J.	Denver, Colo	District Sales Manager, Waterfill & Frazier Distillery Company	
Distal, Angelo	Denver, Colo	District Sales Manager, Calvert-Distillers Corporation	
Franken, Arthur L.	Denver, Colo	District Sales Manager, Seagram-Distillers Corporation	
Harlow, Cecil B.	Denver, Colo	Division Sales Manager, Schenley Distillers Corporation	
Langran, Loyce M.	Dallas, Texas	District Sales Manager, Glenmore Distilleries Company	
Lowenstein, David H.	Denver, Colo	Division Sales Manager, Garrett & Company, Incorporated	
Nier, Harry K.	Denver, Colo	District Sales Manager, Hiram Walker, Incorporated	
Sullivan, Leo	Denver, Colo	District Sales Manager, Brown Forman Distillers Corporation	
Webster, Herbert D.	Denver, Colo	District Sales Manager, National Distillers Products Corporation	
Whitacre, Earl N.	Denver, Colo	District Sales Manager, Frankfort Distilleries, Incorporated	
9 Curscy, Julian W.	San Francisco, Calif.	Regional Sales Manager, National Distillers Products Corporation	
Deatdale, R. L.	Louisville, Ky	Sales Manager, Glenmore Distilleries Company	
Fischel, Victor A.	New York, New York	General Sales Manager, Seagram-Distillers Corporation	
McLaughlin, D. F.	San Francisco, Calif	Western Regional Sales Manager, Schenley Distillers Corporation	
Modlish, R. F.	San Francisco, Calif	Regional Coordinator, Schenley Distillers Corporation	
Nathelm, Milton J.	New York, New York	Executive Vice-President, Schenley Distillers Corporation	
Sabin, Joseph W.	Chicago, Ill	Regional Sales Manager, The Fleischmann Distilling Corporation	
Sobel, Max	San Francisco, Calif	Western Division Sales Manager, Seagram-Distillers Corporation	

Name of individual	Residence	Business affiliation	Organization affiliation
Bert, Phillip R.	Denver, Colo.	District Sales Manager, The American Distilling Company.	Director, Package Association. Director, Package Association. Manager and Ex-Executive Vice-President, Wholesale Association.
10 Bakke, Gerald E.	Denver, Colo.		Ex-Secretary, Package Association.
Boxer, Samuel G.	Denver, Colo.		Vice-President, Package Association.
Buchan, William K.	Lakewood, Colo.		Treasurer, Package Association.
Cahn, Harry O.	Denver, Colo.		Ex-Director, Package Association.
Corgan, Bert C.	Denver, Colo.		Director, Package Association.
Eber, Isadore E.	Denver, Colo.		Ex-Director, Package Association.
Lewkowitz, Earl B.	Denver, Colo.		Director, Package Association.
Lutz, John.	Pueblo, Colo.		Ex-Director, Package Association.
Pringle, Abraham J.	Denver, Colo.		Director, Package Association.
Rudolph, Jack J.	Denver, Colo.		Ex-Director, Package Association.
11 Singer, Jacob	Denver, Colo.		Director, Package Association.
Singer, Harry A.	Denver, Colo.		Ex-Director, Package Association.
Slusark, Samuel D.	Denver, Colo.		Director, Package Association.
Speagle, William F.	Denver, Colo.		Ex-Director, Package Association.
Steis, William F.	Denver, Colo.		Ex-Treasurer, Package Association.
Wainstock, Isadore J.	Denver, Colo.		Ex-Vice-President, Package Association.
Wernst, Edmund	Denver, Colo.		Secretary, Package Association.
Wolson, Benjamin H.	Denver, Colo.		Ex-Secretary and Director, Wholesale Association.
Woxlin, Morton J.	Denver, Colo.		
Kendrick, R. G.	Santa Barbara, California	Secretary, Rouler-Lewin, Inc. Former Regional Sales Manager, Hiram Walker, Incorporated, San Francisco. Vice-President, McKesson & Robbins, Incorporated	
Works, Lyle A.	Denver, Colo.	General Sales Manager and President, Jas. Barclay & Co., Limited.	
12 Tarble, N. E.	Detroit, Michigan	General Sales Manager and President, Hiram Walker, Incorporated	
Sturman, E. N.	Grosse Pie. Park, Michigan	General Sales Manager and President, Gooderham & Worts, Limited	
Gross, Boone	Grosse Pie. Park, Michigan	President, Waterfill & Frazier Distillery Company	
Hirsch, Otto E.	Kansas City, Missouri		Director, Package Association.
Kirk, Charles E.	Denver, Colo.		

13 15. The defendant corporations named in paragraph 13 together with defendants Abraham Rothberg and Joseph Zerobnick are sometimes hereinafter referred to as "defendant wholesalers." The defendants designated in paragraph 14 as being, or as having been, officers and directors of defendant Package Association are sometimes hereinafter referred to as "defendant retailers."

16. During all times hereinafter mentioned some of the corporate defendants named herein have wholly owned or controlled subsidiaries through which a portion of their business is transacted, and wherever in this indictment reference is made to any act or transaction on the part of any one of the said corporate defendants, it shall be deemed to include such act or transaction when performed by any of said subsidiaries.

17. Whenever it is hereinafter alleged in this indictment that any defendant association did any act or thing, such allegation shall be deemed to mean that each of the individuals and corporations named herein as defendants and described as officers, members, agents, or employees of the said defendant association authorized, ordered, or did such act or thing; and whenever it is hereinafter alleged that any defendant corporation (other than defendant associations) did any act or thing, such allegation shall be deemed to mean that each of the said individuals named herein as defendants and described as officers, agents, or employees of the said defendant corporation authorized, ordered, or did such act or thing.

#### IV. Nature of Trade and Commerce Involved

18. Alcoholic beverages are marketed in the State of Colorado by means of a continuous flow of shipments from producers located outside the State of Colorado, through wholesalers and retailers, to the consuming public. Under the laws of the state of Colorado, alcoholic beverages shipped and sold in bottles by producers thereof may be sold to retailers in the State of Colorado only by wholesalers licensed as such under the laws of Colorado. Thus, wholesalers and retailers are the conduit through which alcoholic beverages shipped from states of the United States other than the State of Colorado are sold and distributed to the consuming public within the State of Colorado.

14 19. Until in or about 1940 small quantities of spirituous liquor produced in states of the United States other than the State of Colorado were shipped into the State of Colorado in bulk, bottled in said State, and sold to the consuming public through the medium of wholesalers and retailers. At all times substantial quantities of wines produced in states of the United

States other than the State of Colorado are shipped into the State of Colorado in bulk, bottled in said State, and sold and distributed to the consuming public through the medium of wholesalers and retailers.

20. More than 98% of all spirituous liquor consumed within the State of Colorado is produced outside the State of Colorado and shipped therefrom into the State of Colorado for sale and distribution to the consuming public through the medium of wholesalers and retailers. The total quantity of the spirituous liquors thus shipped into and sold and distributed within the State of Colorado approximates 1,150,000 gallons annually. More than 80% of all wines consumed within the State of Colorado is produced outside the State of Colorado and shipped therefrom into the State of Colorado for sale and distribution to the *State of Colorado for sale and distribution* to the consuming public through the medium of wholesalers and retailers. The total quantity of the wines thus shipped into and sold and distributed within the State of Colorado approximates 800,000 gallons annually. Substantial amounts of the beer consumed within the State of Colorado are produced in states other than the State of Colorado and shipped therefrom into the State of Colorado for sale and distribution to the consuming public through the medium of wholesalers and retailers.

21. Alcoholic beverages are distributed to the more than 700 retailers doing business in the State of Colorado by approximately 28 wholesalers. More than 75% of the spirituous liquors and wines, and substantial quantities of the beer, sold and distributed at wholesale in the State of Colorado are sold and distributed by the defendant wholesalers. All of the spirituous liquor and wines, and substantial quantities of the beer, sold and distributed by the bottle or case to the consuming public in the State of Colorado are sold and distributed by retailers, including defendant retailers and other members of defendant Package Association.

#### V. The Conspiracy

15      22. The Grand Jurors aforesaid, upon their oaths aforesaid, inquiring as aforesaid, do further find, present, and charge that all of the defendants herein, and other persons to the Grand Jurors unknown, well knowing all the facts alleged in this indictment, beginning in or about the month of June 1935, the exact date being to the Grand Jurors unknown, and continuously thereafter up to and including the date of the presentation of this indictment, knowingly have entered into and engaged in a combination and conspiracy to raise, fix, and maintain the whole prices of spirituous liquor and wines shipped into the State of Colorado from producers located outside the State of Colorado by raising,



fixing, and stabilizing wholesale mark-ups and margins of profit on such liquor and wines, which combination and conspiracy has been and is now in restraint of the hereinbefore described trade and commerce in spirituous liquor and wines among the several states and in violation of Section 1 of the Act of Congress of July 2, 1890, entitled "An Act to Protect Trade and Commerce Against Unlawful Restraints and Monopolies" (U. S. C. A. Title 15, Section 1), commonly known as the Sherman Act, and which combination and conspiracy is now described in further detail, that is to say:

23. It is and has been a part of said combination and conspiracy:

(a) That the defendants from time to time discuss, agree upon, and adopt high, arbitrary, and noncompetitive wholesale prices, mark-ups, and margins of profit and arbitrary and noncompetitive discounts.

(b) That beginning in 1937 and continuing thereafter up to and including the date of this indictment the defendant wholesalers and other members of the defendant Wholesale Association and defendant retailers agree upon and undertake a program, in part through the defendant associations, to persuade, induce, and compel producers, including defendant producers, to enter into producer-wholesaler fair trade contracts affecting the various brands of spirituous liquor and wines shipped by said producers into the State of Colorado, and to establish in and by said contracts high, arbitrary, and artificial wholesale prices embodying the arbitrary and noncompetitive mark-ups, margins of profit, and discounts agreed upon as aforesaid.

(c) That as a part of the program agreed upon and undertaken as aforesaid to persuade, induce, and compel producers to enter into such producer-wholesaler fair trade contracts, the defendant Wholesale Association prepare and adopt forms of such fair trade contracts acceptable to the defendant wholesalers and to the other members of the defendant Wholesale Association; that defendant Wholesale Association agree with producers, including some of the defendant producers, upon the forms of fair trade contracts to be issued by said producers; that the defendant Wholesale Association prepare and circulate among its members bulletins and notices announcing the adoption of producer-wholesaler fair trade contracts, and listing the names of all producers entering into producer-wholesaler fair trade contracts and of all producers not entering into such contracts.

(d) That, in connection with revisions in the wholesale prices established in and by the said fair trade contracts, the defendant wholesalers, acting through defendant Wholesale Association, from time to time advise and agree with producers, including defendant producers, as to such revisions so as to preserve and main-

tain the arbitrary and noncompetitive wholesale mark-ups, margins and profit, and discounts agreed upon as aforesaid.

(e) That the defendant wholesalers and the other members of the defendant Wholesale Association agree among themselves and with defendant producers and defendant retailers to sell, and sell, spirituous liquor and wines covered by the said producer-wholesaler fair trade contracts at wholesale prices, mark-ups, and margins of profit not lower, and at wholesale discounts no higher, than those established in said contracts; that the defendant wholesalers agree among themselves and with the defendant producers that wholesalers selling spirituous liquor and wines at prices, mark-ups, and margins of profit lower, and at wholesale discounts higher, than those established in said fair trade contracts be deprived of the opportunity to purchase such spirituous liquor and wines from defendant producers.

17 (f) That in order further to discourage and prevent sales by wholesalers at prices, mark-ups, and margins of profit lower, and discounts higher, than the prices, mark-ups, and margins of profit agreed upon as aforesaid, defendant wholesalers, acting through defendant Wholesale Association, discuss and agree upon so-called "costs of doing business" as a wholesaler reflecting said agreed-upon prices, mark-ups, and margins of profit; and that defendant wholesalers, acting through defendant Wholesale Association, thereafter institute and prosecute legal proceedings ostensibly to obtain judicial determination of the costs of doing business as a wholesaler, but actually for the purpose of securing legal sanction for said agreed-upon "costs of doing business," as aforesaid, by presenting to the Court only facts tending to support said agreed-upon "costs of doing business" and withholding from the Court, and suppressing, facts tending to establish costs of doing business lower than said agreed-upon "costs of doing business" as aforesaid.

(g) That the defendants, acting in part through defendant associations, agree to and do police the high, arbitrary, and noncompetitive wholesale mark-ups and margins of profit, the high, arbitrary, and artificial wholesale prices, and the arbitrary and noncompetitive wholesale discounts agreed upon as aforesaid, and agree to and do require and enforce observance thereof; that defendant Wholesale Association employ paid executives and investigators to spy upon and harass wholesalers who fail or refuse to observe said wholesale prices, mark-ups, margins of profit, and discounts; that defendant Wholesale Association threaten to institute, and in fact institute or cause to be instituted, legal proceedings against wholesalers who fail or refuse to observe said wholesale prices, mark-ups, margins of profit, and discounts; that to finance the aforesaid activities the defendants, beginning in or

about July 1936 and continuing up until the date of this indictment, agree upon and provide for the collection of an extra charge added to the wholesale price, the proceeds thereof to be paid to defendant Wholesale Association, and that defendant Wholesale Association in turn from time to time pay to defendant Package Association a portion of said proceeds.

18 (h) That such fair trade agreements as aforesaid be made, agreed upon, and carried out in a manner and for purposes not contemplated by the Miller-Tydings Amendment to the Sherman Act (Act of Congress, August 17, 1937; 50 Stat. 693) or the Colorado Fair Trade Act (Vol. 4, Sec. 20 (1)-20 (5), C. 165, 1937 Colorado Statutes Annotated).

24. For the purpose of effectuating the aforesaid combination and conspiracy the defendants have regularly and continuously entered into those agreements and done those things which they combined and conspired to do as hereinbefore alleged.

## VI. Effect of the Conspiracy

25. The effect of the combination and conspiracy hereinbefore alleged is and has been (a) to raise, fix, stabilize, and maintain the wholesale prices of spirituous liquor and wines shipped in interstate commerce into the State of Colorado and sold and distributed therein, at levels acceptable to and approved by the defendants; (b) to eliminate price competition among the defendant wholesalers in the sale and distribution of spirituous liquor and wines shipped in interstate commerce into the State of Colorado; (c) to eliminate price competition between defendant wholesalers and the other members of defendant Wholesale Association in the sale and distribution of spirituous liquor and wines shipped in interstate commerce into the State of Colorado; (d) to restrain and suppress interstate trade and commerce in spirituous liquor and wines not covered by producer-wholesaler fair trade contracts.

26. It has never been and is not now the purpose, intent, or effect of said combination and conspiracy to promote the purpose of the Miller-Tydings Act (Act of Congress, August 17, 1937; 50 Stat. 693) and the Colorado Fair Trade Act (Vol. 4, Sec. 20 (1)-20 (5), C. 165, 1937 Colorado Statutes Annotated), or to establish wholesale prices on spirituous liquor and wines for the protection of the goodwill in the trade-marks, brands, or names of the producers or wholesalers producing or distributing such spirituous liquor and wine.

## VII. Jurisdiction and Venue

19 27. The combination and conspiracy herein alleged has been entered into and carried out in part within the District

of Colorado. During the period of said conspiracy and within three years next preceding the presentation of this indictment, the defendants have performed within the District of Colorado many of the acts and things set forth in paragraph 23 hereof.

28. And so the Grand Jurors aforesaid, upon their oaths aforesaid, do find and present that the defendants throughout the period aforesaid, at the places and in the manner aforesaid, unlawfully have engaged in a continuing combination and conspiracy in restraint of the aforesaid trade and commerce in spirituous liquor and wines among the several states of the United States, contrary to the form of the statute of the United States of America in such case made and provided, and against the peace and dignity of the United States.

### COUNT TWO

And the Grand Jurors aforesaid, upon their oaths aforesaid, inquiring as aforesaid, do hereby reaffirm, reallege, and incorporate as if herein set forth in full, each of the allegations set forth in paragraphs 2 to 21, inclusive, contained in Count One of this indictment.

#### I. Period of Time Covered by This Count

29. Each of the allegations hereinafter contained in this count shall be deemed to refer to the period of time beginning in or about January 1936, the exact date being to the Grand Jurors unknown, and continuing thereafter up to and including the date of the presentation of this indictment, unless otherwise expressly stated.

#### II. The Conspiracy

30. The Grand Jurors aforesaid, upon their oaths aforesaid, inquiring as aforesaid, do further find, present, and charge that all of the defendants herein and other persons to the Grand Jurors unknown, well knowing all the facts alleged in this indictment, beginning in or about January 1936, the exact date being to the

Grand Jurors unknown, and continuously thereafter up to  
20 and including the date of the presentation of this indictment,

knowingly have entered into and engaged in a combination and conspiracy to raise, fix, and maintain the retail prices of alcoholic beverages shipped into the State of Colorado from producers located outside the State of Colorado by raising, fixing, and stabilizing retail mark-ups and margins of profit on such alcoholic beverages, which combination and conspiracy has been and is now in restraint of the hereinbefore described trade and commerce in alcoholic beverages among the several states and in violation of

Section 1 of the Act of Congress of July 2, 1890, entitled "An Act to Protect Trade and Commerce Against Unlawful Restraints and Monopolies" (U. S. C. A. Title 15, Section 1), commonly known as the Sherman Act, and which combination and conspiracy is now described in further detail, that is to say:

31. It is—and has been a part of said combination and conspiracy:

(a) That the defendants from time to time discuss, agree upon, and adopt high, arbitrary, and noncompetitive retail prices, mark-ups, and margins of profit.

(b) That beginning in 1937 and continuing thereafter up to and including date of this indictment defendant retailers and defendant wholesalers and other members of defendant associations agree upon and undertake a program, in part through defendant associations, to persuade, induce, and compel producers, including defendant producers, and wholesalers, to enter into fair trade contracts affecting every type and brand of alcoholic beverages shipped into the State of Colorado and to establish in and by said contracts high, arbitrary, and artificial retail prices embodying the high, arbitrary, and noncompetitive retail mark-ups and margins of profit agreed upon as aforesaid.

(c) That as a part of the program agreed upon and undertaken as aforesaid to persuade, induce, and compel producers and wholesalers to enter into such fair trade contracts, the defendant Package Association prepare and adopt forms of fair trade contracts acceptable to the defendant retailers and to the other members

of the defendant Package Association; that defendant  
21 Package Association agree with producers and wholesalers, including some of the defendant producers and defendant wholesalers, upon the forms of fair trade contracts to be used by said producers and wholesalers.

(d) That the defendant Package Association prepare and circulate among its members bulletins and notices announcing the adoption of fair trade contracts and listing the names of producers and wholesalers entering into fair trade contracts and of all producers and wholesalers not entering into such contracts; that defendant retailers, through defendant Package Association, agree to and do patronize only those producers and wholesalers, including defendant producers and defendant wholesalers, who enter into fair trade contracts embodying said retail prices, mark-ups, and margins of profit, and who require and compel observance of the minimum retail prices established in and by said fair trade contracts; that defendant retailers, through defendant Package Association, agree to and do withhold their patronage from producers and wholesalers who fail or refuse to enter into

such fair trade contracts embodying such retail prices, mark-ups, and margins of profit.

(e) That, in connection with revisions in the retail prices established in and by the said fair trade contracts, the defendant retailers, acting through defendant Package Association, from time to time advise and agree with producers and wholesalers, including defendant producers and defendant wholesalers, as to such revisions so as to preserve and maintain the retail mark-ups and margins of profit agreed upon as aforesaid.

(f) That the defendants, acting in part through defendant associations, agree to and do police the high, arbitrary, and non-competitive retail prices, marks-ups, and margins of profit agreed upon as aforesaid, and require and secure observance thereof; that defendant associations employ paid executives and investigators to spy upon and harass retailers who fail or refuse to observe said retail prices, mark-ups, and margins of profit; that defendant associations threaten to institute and in fact institute or cause to be instituted legal proceedings against retailers  
22 who fail or refuse to observe said retail prices, mark-ups, and margins of profit; that the defendant retailers agree among themselves and with the defendant producers and the defendant wholesalers that retailers selling alcoholic beverages at prices, mark-ups, and margins of profit lower than those established in said fair trade contracts be deprived of the opportunity to purchase such alcoholic beverages from defendant producers and defendant wholesalers; that defendant retailers threaten to boycott and in fact boycott wholesalers and producers who supply their products to retailers failing or refusing to observe said retail prices, mark-ups, and margins of profit; that to finance the aforesaid activities the defendants, beginning in or about July 1936 and continuing up until the date of this indictment, agree upon and provide for the collection of an extra charge added to the wholesale price, the proceeds thereof to be paid to defendant Wholesale Association, and that defendant Wholesale Association in turn from time to time pay to defendant Package Association a portion of said proceeds.

(g) That, in disregard of the Colorado Fair Trade Act (Vol. 4, Sec. 20 (1)-20 (5), C. 165, 1937 Colorado Statutes Annotated) and in order to maintain the retail prices, mark-ups, and margins of profit agreed upon and policed as aforesaid, the defendants agree to and do discourage and prevent sales of merchandise being or to be closed out by the owner thereof at retail prices lower than those established in and by said fair trade contracts.

(h) That in order to reduce price competition among retailers, defendant retailers, acting in part through defendant Package Association agree and attempt to persuade and induce the author-



ized officials of the State of Colorado and the City and County of Denver, Colorado, to reject applications for retail liquor licenses.

(i) That such fair trade agreements as aforesaid be made, agreed upon, and carried out in a manner and for purposes not contemplated by the Miller-Tydings Amendment to the Sherman Act (Act of Congress, August 17, 1937; 50 Stat. 693) or the Colorado Fair Trade Act (Vol. 4, Sec. 20 (1)-20 (5), C. 165, 1937 Colorado Statutes Annotated).

32. For the purpose of effectuating the aforesaid combination and conspiracy the defendants have regularly and continuously entered into those agreements and done those things which they combined and conspired to do as hereinbefore alleged.

### III. Effect of the Conspiracy

33. The effect of the combination and conspiracy hereinbefore alleged is and has been (a) to raise, fix, stabilize, and maintain the retail prices of alcoholic beverages shipped in interstate commerce into the State of Colorado and sold and distributed therein, at levels acceptable to and approved by the defendants; (b) to eliminate price competition among the defendant retailers in the sale and distribution of alcoholic beverages shipped in interstate commerce into the State of Colorado; (c) to eliminate price competition among the members of the defendant Package Association in the sale and distribution of alcoholic beverages shipped in interstate commerce into the State of Colorado; (d) to restrain and suppress interstate trade and commerce in alcoholic beverages not covered by fair trade contracts.

34. It has never been and is not now the purpose, intent, or effect of said combination and conspiracy to promote the purposes of the Miller-Tydings Act (Act of Congress, August 17, 1937; 50 Stat. 693) and the Colorado Fair Trade Act (Vol. 4, Sec. 20 (1)-20 (5), C. 165, 1937 Colorado Statutes Annotated), or to establish retail prices on alcoholic beverages for the protection of the goodwill in the trademarks, brands, or names of the producers or wholesalers producing or distributing said alcoholic beverages.

### IV. Jurisdiction and Venue

35. The combination and conspiracy herein alleged has been entered into and carried out in part within the District of Colorado. During the period of said conspiracy and within three years next preceeding the presentation of this indictment, the defendants have performed within the District of Colorado many of the acts and things set forth in paragraph 31 hereof.

36. And so the Grand Jurors aforesaid, upon their oaths aforesaid, do find and present that the defendants throughout the period aforesaid, at the places and in the manner aforesaid, unlawfully have engaged in a continuing combination and conspiracy in restraint of the aforesaid trade and commerce in alcoholic beverages among the several states of the United States, contrary to the form of the statute of the United States of America in such case made and provided, and against the peace and dignity of the United States.

A true bill:

WALTER KLEY, Foreman.

JAMES MCL. HENDERSON,

*Special Assistant to the Attorney General.*

JOHN W. PORTER,

*Special Assistant to the Attorney General.*

JAMES R. BROWNING,

*Special Attorney.*

DONALD W. MARSHALL,

*Special Attorney.*

S. L. R. McNICHOLS,

*Special Attorney.*

THURMAN ARNOLD,

*Assistant Attorney General.*

THOMAS J. MORRISSEY,

*United States Attorney.*

(File endorsement omitted.)

In United States District Court

*Motion to Quash of Hiram Walker, Inc.*

Come now Hiram Walker, Incorporated, \* \* \* defendants in the above entitled action, by their undersigned attorneys, and separately move the Court to quash:

I. Count one of the indictment herein on the ground  
25 that said count does not allege facts which if proven to be true would constitute a criminal offense on the part of these defendants.

II. Count two of said indictment on the ground that said count does not allege facts which if proven to be true would constitute a criminal offense on the part of these defendants.

III. Counts one and two of said indictment on the ground that said counts do not allege facts which if proven to be true, would constitute a criminal offense on the part of these defendants, or any of them, for the following among other reasons:

(1) That spirituous liquor and wines shipped into the State of Colorado from producers located outside the State of Colorado, come under the exclusive control of the State of Colorado after delivery within the state and before sale, and any alleged illegal conduct by these defendants with respect to such liquors is not an offense under the Sherman Act relating to Interstate Commerce but relates solely to Intrastate Commerce and is conduct over which the State of Colorado has exclusive jurisdiction.

(b) That under the Twenty-first Amendment to the Constitution of the United States the individual states are given control over intoxicating liquors within their respective borders, with supreme jurisdiction to prohibit such liquor absolutely, or to permit the sale of intoxicating liquors within the state and exclusively to prescribe all regulations relating to such sale within the state, without violating Article I, Section 8 (3) of the Federal Constitution and without violating any Federal laws, including the Sherman Act, enacted under such Commerce Clause.

IV. Counts one and two of said indictment on the ground that said indictment and each count thereof is so vague, ambiguous, indefinite and uncertain as to fail to apprise these defendants of the nature and character of the accusations made against them and is so ambiguous, indefinite and uncertain as to fail to advise these defendants of the proof which they must expect to meet upon any trial to be had, and so indefinite and uncertain in its allegations that these defendants are unable to prepare their defenses thereto.

V. Counts one and two of said indictment on the ground that the facts therein alleged, if proven to be true, would constitute price fixing, so far as these defendants are concerned, of the type expressly permitted by and under the laws of the United States and the laws of the State of Colorado.

VI. Counts one and two of said indictment on the ground that the facts therein alleged, if proven to be true would, as to these defendants, constitute solely the making and enforcing of contracts which are lawful by the express provisions of the Acts of the Congress of the United States and the statutes of the State of Colorado for the following among other reasons, to wit: as to these defendants, such contracts described in said indictment were solely contracts relating to the sale or resale of commodities which bore the trade-mark, brand or name of the defendant who was the producer of same and which commodities were in free and open competition with commodities of the same general class produced by others; as to these defendants, such contracts described in said indictment were solely contracts which provided that the buyer of such commodities from the producer thereof would not resell such

commodities at less than the respective minimum prices stipulated by the defendant who was the producer thereof; and such contracts described in said indictment were not made between or among producers or between or among distributors or between or among wholesalers or between or among retailers, but each such alleged contract was made between a defendant who produced such commodities, on the one hand, and a distributor, wholesaler or retailer who purchased from such producer the commodities, on the other hand.

VII. Counts one and two of said indictment on the ground that said indictment and each count thereof shows  
27 on its face that this court has no jurisdiction of the subject matter of this indictment.

Respectfully submitted.

CHARLES ROSENBAUM,

PERCY S. MORRIS,

\*A. H. STUART,

*Attorneys for defendants Hiram Walker Incorporated, 930 University Building, Denver, Colorado, \*Penobscot Bldg., Detroit, Mich.*

Filed United States District Court, Denver, Colorado, July 10, 1942—G. Walter Bowman, Clerk.

In United States District Court

*Demurrer of Hiram Walker, Incorporated*

Come now Hiram Walker, Incorporated, \* \* \* defendants in the above-entitled action, and separately demur to the indictment filed herein and as grounds therefor alleges:

I. That the indictment and each count thereof fails to state facts sufficient to constitute an offense against the laws of the United States by these defendants.

II. That said indictment and each count thereof and the matters therein contained and the manner and form as the same are therein set forth are not sufficient in law.

III. That said indictment and each count thereof fails to state facts which, if proved to be true, would constitute a criminal offense on the part of these defendants or any of them, for the following among other reasons:

(a) That spirituous liquor and wines shipped into the State of Colorado, from producers located outside the State of Colorado, come under the exclusive control of the State of Colorado after delivery within the state and before sale, and any alleged illegal conduct by these defendants with respect to such liquors is

not an offense under the Sherman Act relating to interstate commerce but relates solely to intrastate commerce and is conduct over which the State of Colorado has exclusive jurisdiction.

28 (b) That under the Twenty-first Amendment to the Constitution of the United States the individual states are given control over intoxicating liquors within their respective borders, with supreme jurisdiction to prohibit such liquor absolutely, or to permit the sale of intoxicating liquors within the state and exclusively to prescribe all regulations relating to such sale within the state, without violating Article I, Section 8 (3) of the Federal Constitution and without violating any Federal laws, including the Sherman Act, enacted under such Commerce Clause.

IV. That the facts set forth in said indictment, if proven to be true, would constitute price fixing, so far as these defendants are concerned, of the type expressly permitted by and under the laws of the United States and the laws of the State of Colorado.

V. That said indictment and each count thereof, if proven to be true would, as to these defendants, constitute solely the making and enforcing of contracts which are lawful by the express provisions of the Acts of the Congress of the United States and the statutes of the State of Colorado for the following among other reasons, to wit: as to these defendants, such contracts described in said indictment were solely contracts relating to the sale or resale of commodities which bore the trade-mark, brand or name of the defendant who was the producer of same and which commodities were in free and open competition with commodities of the same general class produced by others; as to these defendants, such contracts described in said indictment were solely contracts which provided that the buyer of such commodities from the producer thereof would not resell such commodities at less than the respective minimum prices stipulated by the defendant who was the producer thereof; and such contracts described in said indictment were not made between or among producers or among distributors or between or among wholesalers or between or among retailers, but each such alleged contract was made between a defendant who produced such commodities, on the one hand, and a distributor, wholesaler or retailer who purchased from such producer the commodities, on the other hand.

29 VI. That said indictment and each count thereof is so vague and uncertain that it fails to charge any crime or offense whatsoever and fails to inform or apprise these defendants of the alleged offense wherewith they or any of them are charged, or of the nature or cause of the accusation against them.

VII. That said indictment and each count thereof shows on its face that this court has no jurisdiction in the premises or over the subject matter thereof and that the State of Colorado and the courts of said state have sole and exclusive jurisdiction concerning the subject matter of said indictment and the alleged violations of the law pertaining thereto.

CHARLES ROSENBAUM,  
 PERCY S. MORRIS,  
*930 University Building, Denver, Colorado.*  
 A. H. STUART,  
*Penobscot Bldg., Detroit, Michigan,*  
*Attorneys for defendants, Hiram Walker, Incorporated.*

Filed United States District Court, Denver, Colorado, July 10, 1942—G. Walter Bowman, Clerk.

In United States District Court

*Demurrer and Motion to Quash of Seagram-Distillers Corporation*

Come now Seagram-Distillers Corporation, \* \* \* defendants in the above entitled action, and separately demur to the indictment and move that the Court:

1. Quash Count One of the indictment herein; and for grounds for this demurrer and motion these defendants represent that the said count does not allege fact which, if proved to be true, would constitute a criminal offense on the part of these defendants, or any of them, for the following, among other, reasons:

(a) The distilled products as to which it is claimed the whole-sale and retail price was fixed by defendants, among others, came to rest in the hands of the wholesalers and all crimes alleged are in connection with intrastate commerce.

(b) Under the Twenty-first Amendment to the Constitution of the United States, liquor is taken out of interstate commerce and jurisdiction is vested exclusively in the states, which may regulate it or prohibit it as they please. Consequently, Count One sets out no crime.

(c) Count one alleges that the distillers, or producers as they are termed in the indictment, including these defendants, were coerced into action by the wholesalers and retailers. Consequently, as to said distillers, Count One sets out no crime.

(d) It is no crime for the distillers, including these defendants, to accept the results of agreements between wholesalers and retailers even though such agreements in themselves may be illegal.

(e) Count One is so vague, indefinite, and uncertain as regards



the distillers, including these defendants, that no offense against them can be spelled out of it, nor does it apprise these defendants of the offense with which they are charged, if any.

2. Quash Count Two of the indictment herein; and for grounds of this demurrer and motion these defendants represent that the said count does not allege facts which, if proved to be true, would constitute a criminal offense on the part of these defendants, or any of them, and for the additional reasons set forth under paragraph 1, sub-paragraphs (a) to (e) inclusive.

Of Counsel:

EZRA CORNELL,  
14 Wall Street, New York City,  
W. W. GRANT,  
MORRISON SHAFROTH,  
HENRY W. TOLL,  
*Attorneys for Defendants above named,*  
730 Equitable Building, Denver, Colorado.

Filed United States District Court, Denver, Colorado, July 8, 1942—G. Walter Bowman, Clerk.

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In United States District Court

*Demurrer and Motion to Quash of Schenley  
Distillers Corporation*

Comes now Schenley Distillers Corporation, \* \* \* defendants in the above-entitled action, and separately demur to the indictment and move that the Court:

1. Quash Count One of the indictment herein; and for grounds for this demurrer and motion these defendants represent that the said count does not allege facts which, if proved to be true, would constitute a criminal offense on the part of these defendants, or any of them, for the following, among other, reasons:

(a) The distilled products as to which it is claimed the wholesale and retail price was fixed by defendants, among others, came to rest in the hands of the wholesalers and all crimes alleged are in connection with intrastate commerce.

(b) Under the Twenty-first Amendment to the Constitution of the United States, liquor is taken out of interstate commerce and jurisdiction is vested exclusively in the states, which may regulate it or prohibit it as they please. Consequently, Count One sets out no crime.

(c) Count one alleges that the distillers, or producers as they are termed in the indictment, including these defendants, were coerced into action by the wholesalers and retailers. Consequently, as to said distillers, Count One sets out no crime.

(d) It is no crime for the distillers, including these defendants, to accept the results of agreements between wholesalers and retailers even though such agreements in themselves may be illegal.

(e) Count One is so vague, indefinite, and uncertain as regards the distillers, including these defendants, that no offense against them can be spelled out of it, nor does it apprise these defendants of the offence with which they are charged, if any.

(f) The allegations of fact with respect to these defendants show that said defendants acted in conformity with the provisions of the amendment to the Sherman Anti-Trust Act, known as the Miller-Tydings Amendment, being 15 U. S. C. A., 1, and the laws of the State of Colorado, known as the Colorado Fair Trade Act, Session Laws of 1937, Chapter 146.

2. Quash Count Two of the indictment herein; and for grounds of this demurrer and motion these defendants represent that the said count does not allege facts which if proved to be true, would constitute a criminal offense on the part of these defendants, or any of them, and for the additional reasons set forth under paragraph 1, subparagraphs (a) to (e) inclusive.

Of Counsel:

ROBERT S. MARX,

*Cincinnati, Ohio.*

GEORGE R. BENEMAN,

*Washington, D. C.*

RALPH T. HEYMSFELD,

*New York City, New York.*

IRA C. ROTHGERBER,

WALTER M. APPEL,

*Attorneys for above-named defendants,*

*630 Symes Building, Denver, Colorado.*

Filed United States District Court, Denver, Colorado, July 10, 1942—G. Walter Bowman, Clerk.

In United States District Court

*Demurrer to the Indictment and Motion to Quash Said Indictment of Frankfort Distillers, Inc.*

Come now the defendants, \* \* \*, Frankfort Distilleries, Incorporated, \* \* \*, by their attorneys, and say that said indictment and each count thereof and the matters therein contained, in manner and form as the same are therein alleged and set forth, are insufficient in law to require these defendants, or any of them, to plead to said indictment or any count thereof or to answer the same, and that said indictment and each count thereof are insufficient in law to sustain a judgment against these defend-

ants, or any of them; and, without intending to waive any other substantial causes of demurrer by the enumeration of the following specific causes, demur to said indictment and each count thereof and move to quash the same upon the following grounds:

1. Said indictment and each count thereof are insufficient and wholly fail to set forth any facts or allege or charge the commission of any acts by the defendants, or any of them, constituting an offense against the United States, that is to say:

(a) Three paragraphs of Count One, which undertakes to describe the supposed combination and conspiracy, do not allege or charge a violation of Section 1 of the Act of Congress of July 2, 1890, entitled "An Act to Protect Trade and Commerce against Unlawful Restraints and Monopolies," as amended.

(b) The paragraphs of Count Two, which undertakes to describe the supposed combination and conspiracy, do not allege or charge a violation of Section 1 of the Act of Congress of July 2, 1890, as amended.

(c) It does not appear from the allegations of either Count of the indictment that the defendants combined and conspired to do an act or acts which constitute per se a violation of the Act of Congress of July 2, 1890, as amended.

(d) It does not appear from the allegations contained in said Counts, or in either of them, that the objects or purposes of said supposed combination or conspiracy were intended to be accomplished by any means or methods which would constitute a violation of Section 1 of the Act of Congress of July 2, 1890, as amended; that is to say:

(1) The allegations of the indictment fail to state facts showing that the defendants agreed to effectuate the supposed conspiracy by any unlawful means.

(2) The allegations of the indictment from which must be determined whether the purposes and objects of the supposed conspiracy were to be accomplished by illegal means, are too vague, indefinite, and uncertain to apprise the defendants of the nature of the charges made against them.

(3) The allegations of the indictment fail to state facts showing that the means intended to be used by the defendants to accomplish the supposed conspiracy, constitute a direct, unreasonable or undue restraint of trade or commerce among the several states, or a monopoly thereof.

(4) The allegations of the indictment fail to state facts showing intent or power on the part of the defendants to use means to effectuate the supposed conspiracy which would restrain or monopolize trade or commerce among the several states.

(5) The allegations of the indictment from which must be gathered the means intended to be used to effectuate the supposed conspiracy, constitute mere conclusions of law.

2. Said indictment and each count thereof in purporting to allege an offense against the United States are not sufficiently definite or certain, but on the contrary are vague, indefinite, uncertain and equivocal to such an extent that these defendants and each of them are not advised thereby of the nature and cause of the accusations made against them so that they may properly prepare and submit their separate defenses and avail themselves of a conviction or acquittal for protection against a further prosecution for the same cause.

3. Said indictment and each count thereof are fatally duplicitous, in that each count joins several separate, independent, disconnected and unrelated alleged conspiracies.

4. The conspiracy, alleged in the First Count of the indictment, to raise, fix, and maintain wholesale prices of spirituous liquors and wines was not in restraint of trade or commerce among the several states since it appears on the face of the indictment that such wholesale sales were made by Colorado wholesalers to Colorado retailers in intra-state commerce after said spirituous liquors and wines had come to rest in the hands of said Colorado wholesalers for purposes of sale and had been commingled with Colorado goods.

5. The conspiracy alleged in the Second Count of the indictment, to raise, fix, and maintain retail prices of spirituous liquors and wines was not in restraint of trade or commerce among the several states since it appears on the face of the indictment that such retail sales were made by Colorado retailers to the Colorado consuming public in intrastate commerce after said spirituous liquors  
35 and wines had come to rest in the hands of said Colorado retailers for purposes of sale and had been commingled with Colorado goods.

6. The Sherman Act as amended by the Miller-Tydings Amendment Act of August 17, 1937, 15 U. S. C. Sec. 1, in conjunction with the Colorado Fair Trade Act permits a distiller to contract with a wholesaler or retailer as to resale price on any terms whatever regardless of any conspiracies which may be alleged to exist among the wholesalers and retailers as to the prices, mark-ups and margins of profit to which these groups allegedly intend to adhere.

7. Said indictment and each and every count thereof fails to charge an offense against the United States with the certainty required by law so as to fairly inform these particular defendants of the nature of the charges intended thereby to be preferred against them or to inform these defendants as to which of the numerous acts speciously alleged to have been done by all eighty-two defendants, they are charged to have done or ordered, and

thereby these defendants are unable to understand the exact nature of the charge to be met and properly prepare and submit defenses thereto.

8. Because certain defects are specified herein, it is not intended that any defects, omissions, or imperfections are waived and the same are hereby insisted upon with like effect as if the same were herein specifically set forth and enumerated.

Wherefore, the defendants, and each of them, pray judgment that this demurrer be sustained as to them, and each of them; that said indictment, and each count thereof, be quashed, and that they, and each of them, be dismissed and discharged of this indictment by the court.

ROBERT G. BOSWORTH,

CLYDE C. DAWSON,

PERSHING, BOSWORTH, DICK & DAWSON,

*Attorneys for Frankfort Distilleries, Incorporated.*

Filed United States District Court, Denver, Colorado, July 9, 1942. G. Walter Bowman, Clerk.

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In United States District Court

*Demurrer and Motion to Quash of McKesson & Robbins,  
Incorporated*

Come now McKesson & Robbins, Incorporated. \* \* \*, defendants in the above-entitled action, and separately demur and move that the court quash Counts One and Two of said indictment; and as grounds therefor these defendants state:

(1) That said indictment does not, nor does either count thereof, allege facts which, if proved to be true, would constitute a criminal offense on the part of these defendants or any of them.

(2) That the indictment, and each count thereof, is so vague, indefinite, and uncertain that it fails to appraise these defendants or any of them of the nature of the accusation against them.

W. W. GRANT,

MORRISON SHAFROTH,

HENRY W. TOLL,

730 Equitable Bldg., Denver, Colo.

SILMON SMITH,

Grand Junction, Colorado.

Of counsel:

C. FRANK REAVIS,

20 Pine St., New York City.

Address of defendants: 14th & Lawrence Sts.,  
Denver, Colorado.

Filed United States District Court, Denver, Colorado, July 8, 1942. G. Walter Bowman, Clerk.

In United States District Court

*Demurrer and Motion to Quash of National Distillers Products Corporation to the Indictment*

Come now National Distillers Products Corporation, \* \* \* defendants in the above-entitled matter, by their attorneys, and jointly and severally demur to the indictment filed herein, and to each count thereof, and move to quash the same, and as grounds therefor allege:

37 1. That the indictment fails and each count thereof fails to state facts constituting a charge against these defendants or either of them sufficient, in fact or law, to constitute an offense against the United States of America by these defendants or either of them.

2. That said indictment is, and each count thereof is vague, indefinite, uncertain, and wholly fails to allege any acts or doings of the defendants or either of them which constitute an offense against the laws of the United States of America.

Wherefore, these defendants and each of them pray judgment that this demurrer be sustained as to them and each of them that said indictment and each count thereof be quashed and that they and each of them be dismissed and discharged of this indictment by the court.

HODGES, VIDAL & GOREE,  
WM. V. HODGES,

*Attorneys for defendants National Distillers Corporation,  
947 Equitable Building, Denver, Colorado.*

Filed United States District Court, Denver, Colorado, July 10, 1942. G. Walter Bowman, Clerk.

In United States District Court

*Demurrer to the Indictment and Motion to Quash Said Indictment of Brown Forman Distillers Corporation*

Come now the defendants, Brown Forman Distillers Corporation, \* \* \*, by their attorneys, and say that said indictment and each count thereof and the matters therein contained, in manner and form as the same are therein alleged and set forth, are insufficient in law to require these defendants or any of them, to plead to said indictment or any count thereof or to answer the same, and that said indictment and each count thereof are insufficient in law to sustain a judgment against these defendants, or any of them; and, without intending to waive any other sub-



stantial causes of demurrer by the enumeration of the following specific causes, demur to said indictment and  
 38 each count thereof and move to quash the same upon the following grounds:

1. Said indictment and each count thereof are insufficient and wholly fail to set forth any facts or allege or charge the commission of any acts by the defendants, or any of them, constituting an offense against the United States, that is to say:

(a) The paragraph of Count One, which undertakes to describe the supposed combination and conspiracy, do not allege or charge a violation of Section 1 of the Act of Congress of July 2, 1890, entitled "An Act to Protect Trade and Commerce against Unlawful Restraints and Monopolies," as amended.

(b) The paragraphs of Count Two, which undertakes to describe the supposed combination and conspiracy, do not allege or charge a violation of Section 1 of the Act of Congress of July 2, 1890, as amended.

(c) It does not appear from the allegations of either Count of the indictment that the defendants combined and conspired to do an act or acts which constitute per se a violation of the Act of Congress of July 2, 1890, as amended.

(d) It does not appear from the allegations contained in said Counts, or in either of them, that the objects or purposes of said supposed combination or conspiracy were intended to be accomplished by any means or methods which would constitute a violation of Section 1 of the Act of Congress of July 2, 1890, as amended; that is to say:

(1) The allegations of the indictment fail to state facts showing that the defendants agreed to effectuate the supposed conspiracy by any unlawful means. •

(2) The allegations of the indictment from which must be determined whether the purposes and objects of the supposed conspiracy were to be accomplished by illegal means are too vague, indefinite, and uncertain to apprise the defendants of the nature of the charges made against them.

39 (3) The allegations of the indictment fail to state facts showing that the means intended to be used by the defendants to accomplish the supposed conspiracy, constitute a direct, unreasonable, or undue restraint of trade or commerce among the several states, or a monopoly thereof.

(4) The allegations of the indictment fail to state facts showing intent or power on the part of the defendants to use means to effectuate the supposed conspiracy which would restrain or monopolize trade or commerce among the several states.



(5) The allegations of the indictment from which must be gathered the means intended to be used to effectuate the supposed conspiracy constitute mere conclusions of law.

2. Said indictment and each count thereof in purporting to allege an offense against the United States are not sufficiently definite or certain but, on the contrary, are vague, indefinite, uncertain, and equivocal to such an extent that these defendants and each of them are not advised thereby of the nature and cause of the accusations made against them so that they may properly prepare and submit their separate defenses and avail themselves of a conviction or acquittal for protection against a further prosecution for the same cause.

3. Said indictment and each count thereof are fatally duplicitous in that each count joins several separate independent, disconnected, and unrelated alleged conspiracies.

4. The conspiracy alleged in the First Count of the indictment, to raise, fix, and maintain wholesale prices of spirituous liquors and wines, was not in restraint of trade or commerce among the several states, since it appears on the face of the indictment that such wholesale sales were made by Colorado wholesalers to Colorado retailers in intrastate commerce after said spirituous liquors and wines had come to rest in the hands of said Colorado wholesalers for purposes of sale and had been commingled with Colorado goods.

40 5. The conspiracy alleged in the Second Count of the indictment, to raise, fix, and maintain retail prices of spirituous liquors and wines, was not in restraint of trade or commerce among the several states, since it appears on the face of the indictment that such retail sales were made by Colorado retailers to the Colorado consuming public in intrastate commerce after said spirituous liquors and wines had come to rest in the hands of said Colorado retailers for purposes of sale and had been commingled with Colorado goods.

6. The Sherman Act, as amended by the Miller-Tydings Amendment Act of August 17, 1937, 15 U. S. C., Sec. 1, in conjunction with the Colorado Fair Trade Act, permits a distiller to contract with a wholesaler or retailer as to resale price on any terms whatever regardless of any conspiracies which may be alleged to exist among the wholesalers and retailers as to the prices, mark-ups, and margins of profit to which these groups allegedly intend to adhere.

7. Said indictment and each and every count thereof fails to charge an offense against the United States with the certainty required by law so as to fairly inform these particular defendants of the nature of the charges intended thereby to be preferred

against them or to inform these defendants as to which of the numerous acts speciously alleged to have been done by all eighty-two defendants they are charged to have done or ordered, and thereby these defendants are unable to understand the exact nature of the charge to be met and properly prepare and submit defenses thereto.

8. Because certain defects are specified herein, it is not intended that any defects, omissions, or imperfections are waived, and the same are hereby insisted upon with like effect as if the same were herein specifically set forth and enumerated.

Wherefore the defendants, and each of them, pray judgment that this demurrer be sustained as to them, and each of them; that said indictment, and each count thereof, be  
41 quashed, and that they, and each of them, be dismissed and discharged of this indictment by the court.

DINES, DINES & HOLME,

ROBERT E. MORE,

MILTON J. KEEGAN,

*Attorneys for Brown Forman Distillers Corporation.*

7-10-42 Received three copies of the above.

JAMES R. BROWNING,

*Special Attorney, Anti-Trust Division.*

Filed United States District Court, Denver, Colorado, July 10, 1942. G. Walter Bowman, Clerk.

In United States District Court

*Motion to Quash of J. E. Speegle*

Come now the defendants, \* \* \*. J. E. Speegle, \* \* \*, by their attorney, Edward E. Pringle; \* \* \*, and respectfully move the court as follows:

I. To quash Count One of the Indictment herein on the ground that said Count does not allege facts which if proven to be true would constitute a criminal offense on the part of these defendants, or any of them.

II. To quash Count Two of said Indictment upon the ground that said Count does not allege facts which if proven to be true would constitute a criminal offense on the part of these defendants, or any of them.

III. To quash Counts One and Two of said indictment on the ground that said Counts do not allege facts which if proven to be true would constitute a criminal offense on the part of these defendants, or any of them, for the following among other reasons:

(a) That spirituous liquor and wines shipped into the State of Colorado, from producers located outside the State of Colorado, come under the exclusive control of the State of Colorado, after delivery within the state and before sale, and any alleged illegal conduct by these defendants with respect to such liquors is not an offense under the Sherman Act relating to interstate commerce but relates solely to intrastate commerce and is conduct over which the State of Colorado has exclusive jurisdiction;

(b) That under the Twenty-first Amendment to the Constitution of the United States the individual states are given control over intoxicating liquors within their respective borders, with supreme jurisdiction to prohibit such liquor absolutely, or to permit the sale of intoxicating liquors within the state and exclusively to prescribe all regulations relating to such sale within the state, without violating Article I, Section 8 (3), of the Federal Constitution and without violating any Federal laws, including the Sherman Act, enacted under such Commerce Clause.

IV. To quash Counts One and Two of said Indictment on the ground that said Indictment and each count thereof is so vague, ambiguous, indefinite, and uncertain as to fail to apprise these defendants of the nature and character of the accusations made against them and is so ambiguous, indefinite, and uncertain as to fail to advise these defendants of the proof that they must expect to meet upon any trial to be had, and so indefinite and uncertain in its allegations that these defendants are unable to prepare their defenses thereto.

V. To quash Counts One and Two of said Indictment on the ground that the facts therein alleged, if proven to be true, would constitute price fixing, so far as these defendants are concerned, of the type expressly permitted by and under the laws of the United States and the laws of the State of Colorado.

VI. To quash Counts One and Two of said Indictment on the ground that the facts therein alleged, if proven to be true, would as to these defendants, constitute solely the making and enforcing of contracts which are lawful by the express provisions of the Acts of the Congress of the United States and the statutes of the State of Colorado for the following, among other reasons, to wit: As to these defendants such contracts described in said Indictment were solely contracts relating to the sale or resale of commodities which bore the trade-mark, brand, or name of the producer of the same and which commodities were in free and open competition with commodities of the same general class produced by others; and such contracts described in said Indictment were not made between or among producers or between or among distributors or between or among wholesalers or between or among re-

tailers, but each such alleged contract was made between a producer who produced such commodities, on the one hand, and a distributor, wholesaler, or retailer who purchased from such producer the commodities, on the other hand.

VIII. To quash counts One and Two of said Indictment on the ground that said Indictment and each count thereof shows on its face that this court has no jurisdiction of the subject matter of this Indictment.

Respectfully submitted.

EDWARD E. PRINGLE,  
*Attorney for Defendants, J. E. Speegle,*  
*720 Symes Building, Denver, Colorado.*

Filed United States District Court, Denver, Colorado, July 10, 1942. G. Walter Bowman, Clerk.

In United States District Court

*Demurrer of J. E. Speegle*

Come now the defendants, J. E. Speegle, \* \* \* by their attorney, Edward E. Pringle, and demure to the Indictment filed herein and to both Counts thereof, and as grounds therefor allege:

I. That the Indictment and each count thereof fails to state facts sufficient to constitute an offense against the laws of the United States by these defendants, or any of them.

II. That the Indictment and each count thereof is so vague, indefinite, and uncertain that it fails to apprise these defendants, or any of them, of the nature and cause of the accusation made against them, in violation of the Sixth Amendment to the Constitution of the United States.

III. That said Indictment and each count thereof and the  
44 matters therein contained and the manner and form as the same are therein set forth are not sufficient in law.

IV. That said Indictment does not, nor does either count thereof, allege facts constituting or showing any offense by these defendants, or any of them, against any of the laws of the United States, for the following reasons, among others:

(a) That spirituous liquor and wines shipped into the State of Colorado, from producers located outside the State of Colorado, come under the exclusive control of the State of Colorado, after delivery within the State and before sale, and any alleged illegal conduct by these defendants with respect to such liquors is not an offense under the Sherman Act relating to interstate commerce but relates solely to intrastate commerce and is conduct over which the State of Colorado has exclusive jurisdiction;

(b) That under the Twenty-first Amendment to the Constitution of the United States the individual states are given control over intoxicating liquors within their respective borders, with supreme jurisdiction to prohibit such liquor absolutely, or to permit the sale of intoxicating liquors within the state and exclusively to prescribe all regulations relating to such sale within the state, without violating Article I, Section 8 (3), of the Federal Constitution and without violating any Federal laws, including the Sherman Act, enacted under such Commerce Clause.

V. That said Indictment and each count thereof shows on its face that this court has no jurisdiction in the premises or over the subject matter thereof and that the State of Colorado and the courts of said state have sole and exclusive jurisdiction concerning the subject matter of said indictment and the alleged violations of the law pertaining thereto.

EDWARD E. PRINGLE,

*Attorney for Defendants. J. E. Speegle,  
720 Symes Building, Denver, Colorado.*

Filed United States District Court, Denver, Colorado, July 10, 1942. G. Walter Bowman, Clerk.

45

In United States District Court

*Memorandum opinion*

The sufficiency of this indictment returned March 12, 1942, is directly raised by numerous motions to quash and demurrers filed by the several defendants. Exhaustive arguments have been had and many briefs filed. Count 1 of the indictment charges a combination and conspiracy to raise, fix, and maintain the wholesale price of spirituous liquor and wines. The second count charges a similar combination and conspiracy to raise, fix, and maintain the retail prices of alcoholic beverages. Each count charges a violation of §1 of the Sherman Act.

In the arguments at the bar, and in the briefs of defendants, the issues made are that intoxicating liquor should be accorded a different status from other commodities in the application of the Sherman Act. The argument made is that by virtue of the 21st Amendment to the Constitution, transactions involving interstate sales of alcoholic beverages are removed from the operation of the Commerce Clause of the Federal Constitution and subject to the exclusive regulation of the several states after its arrival therein; and secondly, the charges contained in the indictment in question relate solely to wholesale and retail transactions within the State of Colorado—hence are not transactions in interstate commerce.

The indictment briefly (par. 18 to 21), describes the nature of the trade and commerce involved in the indictment, alleging that alcoholic beverages are marketed in Colorado by a continuous flow of shipments from producers located in other states to and through wholesalers and retailers in Colorado, to the consuming public; that 98%, or more, of all spirituous liquor consumed in Colorado is produced outside and shipped into the state and thus distributed.

Paragraph 22, count 1, charges that the defendants and the other persons unknown, engaged in a combination and conspiracy—"to raise, fix, and maintain the wholesale prices of spirituous liquor and wines shipped into the State of Colorado from producers located outside of Colorado, by raising, fixing, and stabilizing wholesale mark-ups and margins of profit on such liquor and wines."

46 In count 2 of the indictment the charge is exactly the same, except it refers to fixing the retail prices.

It is further charged that the effect of the conspiracy charged is to raise, fix and stabilize, and the maintenance of a wholesale price in Colorado at levels acceptable to and approved by the defendants, thus eliminating price competition among the defendant wholesalers, and between the defendant wholesalers and other members of the defendant wholesale association in the sale and distribution of spirituous liquor and wines shipped into Colorado in interstate commerce, and restraining and suppressing interstate trade and commerce in spirituous liquors and wines not covered by producer-wholesaler fair trade contracts.

The first point made by the defendants may be briefly disposed of. We cannot agree that by the 21st Amendment to the Constitution liquor was removed from interstate commerce, or that jurisdiction over it was thereby vested exclusively in the several states, nor that the said Amendment gave the individual states control over intoxicating liquor within their respective borders, with supreme jurisdiction to regulate or limit the sale thereof, without violating the Commerce Clause of the Federal Constitution and the Sherman Act.

We take judicial notice that the objective of the 21st Amendment was the repeal of the 18th Amendment. The proviso therein contained prohibiting the transportation or importation into a state for delivery or use in violation of the laws thereof of liquor was a saving clause to avoid a conflict with those states which at the time had their own state prohibition laws, or might thereafter adopt prohibition as a matter of state policy. The Amendment was never intended to deprive the Federal Government of any of its vast powers over interstate commerce be-



tween or among the states, and certainly was not designed to limit in the slightest degree the jurisdiction of the Federal Government for the power conferred upon it by the Commerce Clause of the Federal Constitution.

In *Jameson v. Morgenthau*, 307 U. S. 171, the Supreme Court held that there was no substance in the contention that the 21st

Amendment gave the states any exclusive control over commerce in intoxicating liquors, unlimited by the Commerce

Clause of the Federal Constitution. The Amendment simply gives the states the right to adopt or reject prohibition as a matter of state policy as they might see fit.

The power of Congress over interstate commerce is complete and can neither be enlarged nor diminished by the exercise or nonexercise of state power, and extends to those intrastate activities which so affect interstate commerce, or the exercise of the power of Congress over it, as to make their regulation an appropriate means to the attainment of a legitimate end.

In the case at bar the agreement denounced in the indictment may, for the sake or argument, be denominated as an intrastate activity or agreement. It nevertheless affected interstate commerce, because it regulated and prescribed the price at which liquor shipped by certain defendants—the producers—to other defendants—the wholesalers and retailer in Colorado—would be sold for consumption and resale there. Thus it is an intrastate activity affecting interstate commerce, and subject to the Sherman Act, *U. S. v. Darby*, 312 U. S. 100.

In reference to the Wilson Act, and the other similar acts discussed at length in some of the briefs in support of the motions, it is only necessary to say that they merely provide that liquors transported into any state and remaining there for use, shall upon arrival in such state be subject to the operation and effect of the laws of such state enacted in the exercise of its police power, to the same extent and in the same manner as though such liquids or liquors had been produced in such state or territory, whether imported in the original package or not. These acts were passed by the Congress to insure to the states complete control over intoxicating liquor, and remove from liquor shipped into a state the protection of the Interstate Commerce Clause, and make it subject at once to state regulation, in spite of the original package decisions.

As stated in *In re Rahrer*, 140 U. S. 545, at p. 560, Congress simply declared that liquor upon arrival in the state shall fall within the category of domestic articles of a similar nature. And in *Clark Distilling Co. v. Western Maryland Ry. Co.* and

48 *State of West Va.*, 242 U. S. 311, the Supreme Court held the Webb-Kenyon Act withdrew from the immunity of



interstate commerce liquor shipped into a state for personal use, contrary to state law; and withdrew from shipments of liquor into states having prohibition the immunity of interstate commerce.

The most serious contention made, and one which has given the court the most trouble, is the argument that intoxicating liquor once delivered to a wholesaler in Colorado ceases to be in interstate commerce, and that agreements fixing the prices of liquor by such wholesalers and retailers within the state do not constitute violations of the Sherman Act, because interstate commerce has ceased prior to such sales.

The indictment, however, charges in effect that the fixing of the prices of the liquor after it had come into possession of the wholesalers in Colorado, was the result of a combination entered into by the producers in other states and the wholesalers and retailers in Colorado prior to the shipment of the liquors in question from the producer outside the state to the wholesalers and retailers within the state, for distribution to consumers. The producers are named as conspirators, and are included in the term "all of the defendants" used in paragraph 22 of the indictment.

It is also charged that the local defendants; that is the defendant wholesalers, and other members of the defendant wholesale association, and the retailers, undertook to induce and compel the defendant producers to enter into the producer-wholesaler fair trade contracts affecting the various brands of liquor shipped by the producers into Colorado, and thereby establish arbitrary and artificial wholesale prices embodying the arbitrary and non-competitive mark-up margins of profits agreed upon. In other words, the producers who manufacture and ship the liquor from outside of Colorado into the state, are directly charged with entering into the agreements to fix the price of the liquor after arrival here.

It is further alleged in paragraph 23 (e), that the defendants—including the producers—agreed to sell only at prices not lower, and at wholesale discounts not higher, than those established by said contracts, and that the wholesalers agreed among themselves, and with the producers, that  
 49 any wholesalers selling at other prices would be deprived of the opportunity to purchase such spirituous liquor and wines from defendant producers. This was a means adopted to enforce the unlawful conspiracy, and a direct interference with interstate commerce, and constituted, as stated in *Local 167, International Brotherhood of Teamsters v. U. S.*, 291 U. S. 297, a burden on interstate commerce at the point of origin, and before the interstate journey began, and in the state of destination where

the interstate movement ended, and thus operated directly to restrain and monopolize interstate commerce. That case further held (p. 297): "The Sherman Act denounces every conspiracy in restraint of trade, including those that are to be carried on by acts constituting intrastate transactions."

In the *Darby* case, 312 U. S. 100, it was held, p. 114:

"The power of Congress over interstate commerce 'is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations other than are prescribed in the Constitution.' That power can neither be enlarged nor diminished by the exercise or nonexercise of state power. \* \* \* Such regulation is not a forbidden invasion of state power merely because either its motive or its consequence is to restrict the use of articles of commerce within the states of destination; and is not prohibited unless by other Constitutional provisions."

P. 118:

"The power of Congress over interstate commerce is not confined to the regulation of commerce among the states. It extends to those activities intrastate which so affect interstate commerce or the exercise of the power of Congress over it as to make regulation of them appropriate means to the attainment of a legitimate end, the exercise of the granted power of Congress to regulate interstate commerce."

P. 119:

"But it does not follow that Congress may not by appropriate legislation regulate intrastate activities where they have a substantial effect on interstate commerce. \* \* \* But long before the adoption of the National Labor Relations Act this court  
50 had many times held that the power of Congress to regulate interstate commerce extends to the regulation through legislative action of activities intrastate which have a substantial effect on the commerce or the exercise of the Congressional power over it."

P. 121:

"A familiar like exercise of power is the regulation of intrastate transactions which are so commingled with or related to interstate commerce that all must be regulated if the interstate commerce is to be effectively controlled."

And p. 122:

"The Sherman Act and the National Labor Relations Act are familiar examples of the exertion of the commerce power to pro-

hibit or control activities wholly intrastate because of their effect on interstate commerce."

It follows from these cases that the Sherman Act is broad enough to denounce restraints of trade carried out by acts themselves constituting intrastate transactions. See also *Dr. Miles Medical Co. v. Park & Sons*, 220 U. S. 373. There the court said that the agreement in question between druggists and jobbers and the retail druggists (p. 400):

"relate directly to interstate as well as intrastate trade, and operate to restrain trade or commerce among the several states, is also clear."

See also *U. S. v. General Motors*, 121 Fed. (2d) 376. It is said, p. 402:

"It is well settled that the Federal Government may under the Sherman Act regulate local commerce which is intimately related to interstate commerce or local activity which obstructs or burdens interstate commerce." (Citing cases.)

For the latest expression of the Supreme Court on this question see *U. S. Univis Lens Corp.*, 316 U. S. 241, at p. 252:

"Agreements for price maintenance of articles moving in interstate commerce are, without more, unreasonable restraints within the meaning of the Sherman Act, because they eliminate competition."

And *U. S. v. Masonite Corp.*, 316 U. S. 265 stated (p. 276):  
51 "The fixing of prices by one member of a group, pursuant to express delegation, acquiescence, or understanding, is just as illegal as the fixing of prices by direct, joint action."

And this, irrespective of the fact that the combination may increase the distribution of the particular article in question without an increased price to the consumer; or the fact that from other points of view the arrangements might be deemed to have desirable consequences, would be no more a legal justification of price-fixing than were the "competitive evils" in the *Socony-Vacuum* case.

If we stop to consider the factual situation we find, as pointed out, that the producer who manufactured liquor outside of Colorado was a member of the conspiracy, the object of which was to compel him to agree to the price scale fixed by the local wholesalers and retailers in Colorado, and which affected the shipment of the producers' goods from the instant they entered interstate commerce en route to Colorado, and before they became at rest in the wholesalers' warehouses.

In 112 Fed. (2d) 417 (CCA 10th), the court said in *Hayes* case, speaking of the 21st Amendment:

"We do not regard it as a surrender of the power of Congress to prohibit or regulate the transportation of intoxicating liquor in interstate commerce."

It is contended that the defendants acted under the provisions of Colorado law. We find no act in Colorado authorizing a conspiracy to fix prices to the injury of competitors. In fact § 20 of the liquor code as amended, specifically provides that

"nothing herein shall be construed as delegating unto the licensing authority the power to fix prices."

Sec. 1 of the state Fair Trade Act refers only to the resale of commodities which are in free and open competition with commodities of the same general class produced or distributed by others. Here the burden of the Government's charge is that the defendants by the agreements in question have attempted to eliminate competition in their trade-mark brands.

It is a well-established rule of our jurisprudence that acts consisting of a combination calculated to cause damage to others may be unlawful, and the power to punish such acts when done maliciously cannot be denied because they are to be followed and worked out by conduct which might have been lawful, if not preceded by the acts.

"The most innocent and constitutionally protected of acts or omissions may be made a step in a criminal plot, and if it is a step in a plot neither its innocence nor the Constitution is sufficient to prevent the punishment of the plot by law." *Loewe v. Lawlor*, 208 U. S. 274, at p. 299.

"Intent may make an otherwise innocent act criminal, if it is a step in a plot." *Badders v. U. S.* 240 U. S. 391, at p. 394.

"But the character of every act depends upon the circumstances in which it is done." *Aikens v. Wisconsin*, 195 U. S. 194, at pp. 205-6, cited with approval in *Schenck v. U. S.*, 249 U. S. 47, at p. 52.

The law of these decisions is that; the Congressional power over interstate commerce includes conspiracies to be carried out solely by intrastate transactions; that the power of Congress over interstate commerce is complete in itself and can neither be enlarged nor diminished by the exercise or nonexercise of state power, and extends to intrastate activities which affect interstate commerce. The power of Congress to regulate interstate commerce extends to the regulation of intrastate activities having a substantial effect on the commerce or the Congressional power over it. And finally in case of conflict state power must give way to Federal.

This would seem to answer all of the contentions made in support of the several demurrers and motions to quash and require their overruling.

It is so ordered.

J. FOSTER SYMES, *District Judge.*

OCTOBER 10, 1942.

Filed United States District Court, Denver, Colorado, October 10, 1942. G. Walter Bowman, Clerk.

Entered on the Docket October 10, 1942.

In United States District Court

53      *Order Overruling Demurrers and Motions to Quash*  
Oct. 10, 1942

This case having heretofore come on to be heard on the demurrers and motions to quash, of the various defendants, and having been argued by counsel, and briefs in support thereof having been filed herein, and the court having taken the matter under advisement, and being now fully advised in the premises; thereupon, upon consideration thereof and pursuant to a memorandum filed herein this day;

It is ordered by the court that the several demurrers and motions to quash be, and they are hereby overruled.

Entered on the Docket October 10, 1942.

In United States District Court

*Order Quashing First Count of Indictment etc.*

Nov. 20, 1942

At this day comes Thomas J. Morrissey, Esquire, District Attorney, who prosecutes the pleas of the United States in this behalf and James McL. Henderson, Esquire, Special Attorney for the prosecution of the above-entitled case also comes; and the defendants \* \* \* Hiram Walker, Incorporated; Seagram Distillers Corporations; Schenley Distillers Corporation; Brown Forman Distillers Corporation; Frankfort Distilleries, Incorporated; National Distillers Products Corporation; McKesson & Robbins, Incorporated, and J. E. Speegle in their own proper persons and by their officers, and \* \* \* Charles Rosenbaum, W. W. Grant, Robert E. More, Robert G. Bosworth; William V. Hodges and Morris Rifkin, Esquires, their attorneys, also come.

And the various motions of the defendants to quash the indictment herein and to require the plaintiff to elect upon which count of the indictment it will proceed, having heretofore come on to be heard and having been ruled on by the court, thereupon, the district attorney saith that he will and doth hereby elect to stand upon the second count of the indictment herein.

Thereupon, it is ordered by the court that the first count of the indictment herein be, and the same is hereby, quashed, and that the defendants of and from the premises in the first count of this said indictment specified be discharged and go hence hereof without day.

Thereupon, the defendants are arraigned and the defendants \* \* \* Hiram Walker, Incorporated, by E. N. Sturman, its president; Seagram Distillers Corporation, by W. W. Grant, Esquire, its attorney; Schenley Distillers Corporation, by Milton J. Nauheim, its executive vice-president; Brown-Forman Distillers Corporation and Frankfort Distilleries, Incorporated, by Robert G. Bosworth, their attorney; National Distillers Products Corporation, by Wm. V. Hodges, Esquire, its attorney; McKesson & Robbins, Incorporated, by W. W. Grant, its attorney; and J. E. Speegle, each for himself and not one for the other pleads not guilty to the second count of the indictment herein, and of this they put themselves upon the country and the district attorney doth the like.

And the separate motions of the defendants for a bill of particulars coming on now to be heard are argued by counsel. And the court having considered the same and being now fully advised in the premises:

It is ordered by the court that an order be drawn in accordance with the court's ruling and presented to the court for its signature.

Entered on the Docket November 20, 1942.

#### In United States District Court

##### *Ruling of the Court on Motions for Bills of Particulars*

The Court: Referring to that part of the bill of particulars of the defendants McKesson & Robbins et al., beginning on page 4, and directed to the second count of the indictment, it is ordered:

55 Paragraph 10, subdivisions (a) and (b), are denied.

Subdivision (c), the government will state whether the conspiracy charged was by express agreement or implied agreement; if express, the time and place when it was entered into; if implied, the names of some of the individuals defendant or cor-



porate representatives who acted for each of the moving defendants, so they can identify the particular meeting or transaction referred to.

Subdivision (d), state as accurately as the government can the time each defendant entered into the alleged combination or conspiracy but not necessarily the place.

Paragraph 11 is denied.

Paragraph 12, the government will state whether the alleged agreement was in writing; and if so, identify any writings relied upon.

Paragraph 13, the government will state which of the defendants voluntarily entered into this conspiracy and what defendants were persuaded or forced into it. Subdivisions (c), (d), and (e) will be denied.

Paragraph 14, the government will state whether the alleged agreement to compel producers and wholesalers to enter into fair trade contracts as alleged in said paragraph was expressed or implied; and if express, identify any written documents covering the same; and if oral, the time, about, and the place where it was entered into.

Paragraph 15 is denied.

Paragraph 16, the government will state whether the alleged agreement to revise retail prices established was express or implied; and if express, the nature thereof and identify the writings, if any.

Paragraph 17, the government will furnish the names of the wholesalers, producers, and retailers who were boycotted, as alleged.

Paragraph 18, subdivision (2), the names of the officials of the State of Colorado and of the City of Denver whom the defendants attempted to induce to reject applications for retail liquor licenses as alleged in paragraph 31 (h); and (b) the names of the applicants for retail liquor licenses referred to in said paragraph.

56 Paragraph 19 is denied.

Paragraph 20 (a) and (b) of the motion will be denied.

All the information to be furnished by this order shall be furnished to the best ability of the government to each moving defendant, and in the event the government cannot comply, or the defendants are not satisfied with the statement made, counsel may come into court for discussion and further ruling on any omissions or objections to the bill of particulars as furnished. This bill of particulars will be furnished by the 15th of December. Plaintiff may have the privilege of amending it thereafter at any time up to ten days before the date this case is set for the trial.



All other motions for bills of particulars are hereby overruled and denied.

J. FOSTER SYMES, *U. S. District Judge.*

NOVEMBER 24, 1942.

Filed United States District Court, Denver, Colorado, November 24, 1942. G. Walter Bowman, Clerk.

Entered on the Docket November 24, 1942.

In United States District Court

*Judgment as to Hiram Walker, Incorporated*

July 28, 1943

At this day comes Thomas J. Morrissey, Esquire, District Attorney, and James McL. Henderson, Esquire, Special Assistant to the Attorney General, who prosecutes the above-entitled case, and the defendant, Hiram Walker, Inc., by Harry K. Nier, District Manager, its designated officer, and by Charles Rosenbaum, Esquire, its attorney, also comes.

And thereupon the defendant, Hiram Walker, Inc., by its designated officer, now withdraws its former plea of not guilty to the second count of the indictment herein and presents to the court now here its plea of nolo contendere 57 and prays the court to pass sentence upon it in all things as if it had pleaded guilty to the indictment herein. And the consequences and effects thereof being now here fully explained, it still persists therein.

Wherefore, it is considered and adjudged by the court upon the plea of nolo contendere that the defendant, Hiram Walker, Inc., is guilty of a conspiracy to violate the Sherman Act and for having committed the crime aforesaid is by the court sentenced to pay to the United States of America a fine of Thirty-Five Hundred Dollars (\$3,500.00) and that the United States have execution therefor.

Thereupon, it is ordered by the court that the defendant have to and including the fourth day of August, A. D. 1943, within which to pay said fine.

Entered on the Docket July 28, 1943.

In United States District Court

*Judgment as to Seagram-Distillers Corporation*

July 28, 1943

At this day comes Thomas J. Morrissey, Esquire, District Attorney, and James McL. Henderson, Esquire, Special Assistant to

the Attorney General, who prosecutes the above-entitled case, and the defendant, Seagram-Distillers Corporation, by Arthur L. Franzen, its designated officer, and by W. W. Grant, Esquire, its attorney, also comes.

And thereupon the defendant, Seagram-Distillers Corporation, by its designated officer, now withdraws its former plea of not guilty to the second count of the indictment herein and presents to the court now here its plea of nolo contendere and prays the court to pass sentence upon it in all things as if it had pleaded guilty to the indictment herein. And the consequences and effects thereof being now here fully explained, it still persists therein.

Wherefore, it is considered and adjudged by the court upon the plea of nolo contendere that the defendant, Seagram-Distillers Corporation, is guilty of a conspiracy to violate the Sherman Act and for having committed the crime aforesaid is by the court sentenced to pay to the United States of America a fine of  
 58 Thirty-Five Hundred Dollars (\$3,500.00) and that the United States have execution therefor.

Thereupon, it is ordered by the court that the defendant have to and including the fourth day of August, A. D. 1943, within which to pay said fine.

Entered on the Docket July 28, 1943.

In United States District Court

*Judgment as to Schenley Distillers Corporation*

July 28, 1943

At this day comes Thomas J. Morrissey, Esquire, District Attorney, and James McL. Henderson, Esquire, Special Assistant to the Attorney General, who prosecutes the above-entitled case, and the defendant, Schenley Distillers Corporation, by Jerry Schoenwald, its designated officer, and by Ira C. Rothgerber, Esquire, its attorney, also comes.

And thereupon the defendant, Schenley Distillers Corporation, by its designated officer, now withdraws its former plea of not guilty to the second count of the indictment herein and presents to the court now here its plea of nolo contendere and prays the court to pass sentence upon it in all things as if it had pleaded guilty to the indictment herein. And the consequences and effects thereof being now here fully explained, it still persists therein.

Wherefore, it is considered and adjudged by the court upon the plea of nolo contendere that the defendant, Schenley Distillers Corporation, is guilty of a conspiracy to violate the Sherman Act and for having committed the crime aforesaid is by the court sen-

tenced to pay to the United States of America a fine of Three Thousand Dollars (\$3,000.00) and that the United States have execution therefor.

Thereupon, it is ordered by the court that the defendant have to and including the fourth day of August, A. D. 1943, within which to pay said fine.

Entered on the Docket July 28, 1943.

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In United States District Court

*Judgment as to Frankfort Distilleries, Inc.*

July 28, 1943

At this day comes Thomas J. Morrissey, Esquire, District Attorney, and James McL. Henderson, Esquire, Special Assistant to the Attorney General, who prosecutes the above-entitled case, and the defendant, Frankfort Distilleries, Inc., by Earl L. Whitacre, its designated officer, and and by Robert G. Bosworth, Esquire, its attorney, also comes.

And thereupon the defendant, Frankfort Distilleries, Inc., by its designated officer, now withdraws its former plea of not guilty to the second count of the indictment herein and presents to the court now here its plea of nolo contendere and prays the court to pass sentence upon it in all things as if it had pleaded guilty to the indictment herein. And the consequences and effects thereof being now here fully explained, it still persists therein.

Wherefore, it is considered and adjudged by the court upon the plea of nolo contendere that the defendant, Frankfort Distilleries, Inc., is guilty of a conspiracy to violate the Sherman Act and for having committed the crime aforesaid is by the court sentenced to pay to the United States of America a fine of Three Thousand Dollars (\$3,000.00) and that the United States have execution therefor.

Thereupon, it is ordered by the court that the defendant have to and including the fourth day of August, A. D. 1943, within which to pay said fine.

Entered on the Docket July 28, 1943.

In United States District Court

*Judgment as to McKesson & Robbins, Incorporated*

July 28, 1943

At this day comes Thomas J. Morrissey, Esquire, District Attorney, and James McL. Henderson, Esquire, Special Assistant to

the Attorney General, who prosecutes the above-entitled case, and the defendant, McKesson & Robbins, Inc., by L. A. Works, its designated officer, and by W. W. Grant, Esquire, its attorney, also comes.

And thereupon the defendant, McKesson & Robbins, Inc., by its designated officer, now withdraws its former plea  
60 of not guilty to the second count of the indictment herein and presents to the court now here its plea of nolo contendere and prays the court to pass sentence upon it in all things as if it had pleaded guilty to the indictment herein. And the consequences and effects thereof being now here fully explained, it still persists therein.

Wherefore, it is considered and adjudged by the court upon the plea of nolo contendere that the defendant, McKesson & Robbins, Inc., is guilty of a conspiracy to violate the Sherman Act and for having committed the crime aforesaid is by the court sentenced to pay to the United States of America a fine of Three Thousand Dollars (\$3,000.00) and that the United States have execution therefor.

Thereupon, it is ordered by the court that the defendant have to and including the fourth day of August, A. D. 1943, within which to pay said fine.

Entered on the Docket July 28, 1943.

#### In United States District Court

#### *Judgment as to National Distillers Products Corporation*

July 28, 1943

At this day comes Thomas J. Morrissey, Esquire, District Attorney, and James McL. Henderson, Esquire, Special Assistant to the Attorney General, who prosecutes the above-entitled case, and the defendant, National Distillers Products Corporation, by Henry C. Vidal, its designated officer, and by William V. Hodges, Esquire, and Henry C. Vidal, Esquire, its attorneys, also comes.

And thereupon the defendant, National Distillers Products Corporation, by its designated officer, now withdraws its former plea of not guilty to the second count of the indictment herein and presents to the court now here its plea of nolo contendere and prays the court to pass sentence upon it in all things as if it had pleaded guilty to the indictment herein. And the consequences and effects thereof being now here fully explained, it still persists therein.

Wherefore, it is considered and adjudged by the court upon the plea of nolo contendere that the defendant, National Distillers Products Corporation, is guilty of a conspiracy to violate the Sherman Act and for having committed the crime  
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aforesaid is by the court sentenced to pay to the United States of America a fine of Three Thousand Dollars (\$3,000.00) and that the United States have executed therefor.

Thereupon, it is ordered by the court that the defendant have to and including the fourth day of August, A. D. 1943, within which to pay said fine.

Entered on the Docket July 28, 1943.

In United States District Court

*Judgment as to Brown Forman Distillers Corporation*

July 28, 1943

At this day comes Thomas J. Morrissey, Esquire, District Attorney, and James McI. Henderson, Esquire, Special Assistant to the Attorney General, who prosecutes the above-entitled case, and the defendant, Brown-Forman Distillers Corporation, by Leo Sullivan, its designated officer, and by Robert E. More, Esquire, its attorney, also comes.

And thereupon the defendant, Brown-Forman Distillers Corporation, by its designated officer, now withdraws its former plea of not guilty to the second count of the indictment herein and presents to the court now here its plea of nolo contendere and prays the court to pass sentence upon it in all things as if it had pleaded guilty to the indictment herein. And the consequences and effects thereof being now here fully explained, it still persists therein.

Wherefore, it is considered and adjudged by the court upon the plea of nolo contendere that the defendant, Brown-Forman Distillers Corporation, is guilty of a conspiracy to violate the Sherman Act and for having committed the crime aforesaid is by the court sentenced to pay to the United States of America a fine of Twenty-Five Hundred Dollars (\$2,500.00) and that the United States have execution therefor.

Thereupon, it is ordered by the court that the defendant have to and including the fourth day of August, A. D. 1943, within which to pay said fine.

Entered on the Docket July 28, 1943.

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In United States District Court

*Judgment as to J. E. Speegle*

July 28, 1943

At this day comes Thomas J. Morrissey, Esquire, District Attorney, and James McI. Henderson, Esquire, Special Assistant to

the Attorney General, who prosecutes the above-entitled case, and the defendant, J. E. Speegle, in his own proper person, and by Morris Rifkin, Esquire, his attorney, also comes.

And thereupon the defendant, J. E. Speegle, now withdraws his former plea of not guilty to the second count of the indictment herein and presents to the court now here his plea of nolo contendere and prays the court to pass sentence upon him in all things as if he had pleaded guilty to the indictment herein. And the consequences and effects thereof being now here fully explained, he still persists therein.

Wherefore, it is considered and adjudged by the court upon the plea of nolo contendere that the defendant, J. E. Speegle, is guilty of a conspiracy to violate the Sherman Act and for having committed the crime aforesaid is by the court sentenced to pay to the United States of America a fine of Twenty-Five Hundred Dollars (\$2,500.00) and that the United States have execution therefor.

Thereupon, it is ordered by the court that the defendant have to and including the fourth day of August, A. D. 1943, within which to pay said fine.

Entered on the Docket July 28, 1943.

### In United States District Court

#### *Notice of Appeal*

Name and address of Appellant: Hiram Walker, Incorporated, Peoria, Illinois.

Name and address of appellant's attorney: Charles Rosenbaum, 930 University Building, Denver, Colorado.

63 Offense: The second count of the indictment on which the government has elected to rely, charged a conspiracy to restrain interstate commerce in violation of the Sherman Act (15 U. S. C. A., Section 1).

Date of Judgment: July 28, 1943.

Brief description of judgment or sentence: The defendant was fined Three Thousand Five Hundred Dollars (\$3,500.00).

We, the above-named appellant, do hereby appeal to the United States Circuit Court of Appeals for the Tenth Circuit from the judgment above-mentioned on the grounds set forth below.

[CORPORATE SEAL]

HIRAM WALKER, INCORPORATED,  
By FLETCHER RUARK,

*Vice President.*

Dated July 28, 1943.

*Grounds of Appeal*

The appellant contends that the second count of the indictment does not state facts constituting a crime committed by this appellant; that the second count of the indictment does not charge an offense under the Sherman Act for the reason that the acts charged in the second count of the indictment related to a commodity which had ceased to be in interstate commerce and which was solely in intrastate commerce; that the second count of the indictment is fatally defective in that it does not charge an agreement among the defendants to accomplish an illegal act; that the second count of the indictment does not state facts sufficient to charge an offense under the Sherman Act committed by this appellant; that the allegations of the second count of the indictment are so vague, ambiguous, indefinite, and uncertain as to be in violation of the Sixth Amendment to the Constitution of the United States; and that the acts in the second count of the indictment charged to the appellant were performed under the sanction of the laws of the State of Colorado; that the sole jurisdiction over such acts was vested in the State of Colorado by the Constitution and Laws of the United States; that the trial court erred in the following respects: (a) In overruling the defendant's Demurrer to the Second Count of the indictment; and

64 (b) in overruling the defendant's motion to quash the second count of the indictment.

CHARLES ROSENBAUM,

*Attorney for the Appellant,*

*Hirman Walker, Incorporated,*

*930 University Building, Denver, Colorado.*

Filed United States District Court, Denver, Colorado, July 28, 1943. G. Walter Bowman, Clerk.

In United States District Court

*Notice of Appeal*

Name and address of Appellant: Seagram-Distillers Corporation, New York City.

Name and address of appellant's attorney: W. W. Grant, 730 Equitable Building, Denver, Colorado.

Offense: The second count of the indictment to restrain interstate commerce in violation of the Sherman Act, (15 U. S. C. A., Section 1).

Date of Judgment: July 28, 1943.

Brief description of judgment or sentence: The defendant was fined Thirty-five Hundred Dollars (\$3,500).



The above-named appellant does hereby appeal to the United States Circuit Court of Appeals for the Tenth Circuit from the judgment above-mentioned on the grounds set forth below.

SEAGRAM-DISTILLERS CORPORATION.

By A. L. FRANZEN.

Dated July 28, 1943.

*Grounds of Appeal*

The appellant contends that the second count of the indictment does not state facts constituting a crime committed by this appellant; that the second count of the indictment does not charge an offense under the Sherman Act for the reason that the acts charged in the second count of the indictment related to a commodity which had ceased to be in interstate commerce and which was solely in intrastate commerce; that the second count of the indictment is fatally defective in that it does not charge  
65 an agreement among the defendants to accomplish an illegal act; that the second count of the indictment does not state facts sufficient to charge an offense under the Sherman Act committed by this appellant; that the allegations of the second count of the indictment are so vague, ambiguous, indefinite, and uncertain as to be in violation of the Sixth Amendment to the Constitution of the United States; and that the acts in the second count of the indictment charged to the appellant were performed under the sanction of the laws of the State of Colorado; that the sole jurisdiction over such acts was vested in the State of Colorado by the Constitution and Laws of the United States; that the trial court erred in the following respects: In overruling the defendant's Motion to Quash and Demurrer to the Second Count of the Indictment.

W. W. GRANT,

*Attorney for the Appellant,*

*Seagram-Distillers Corporation,*

*730 Equitable Building, Denver, Colorado.*

Filed United States District Court, Denver, Colorado, July 28, 1943. G. Walter Bowman, Clerk.

In United States District Court

*Notice of Appeal*

Name and address of Appellant: Schenley Distillers Corporation, 350 Fifth Avenue, New York City, New York.

Name and address of Appellant's attorney: Robert S. Marx, 900 Traction Building, Cincinnati, Ohio; Rothgerber & Appel, 630 Symes Building, Denver, Colorado.

Offense: The second count of the indictment, on which the Government has elected to rely, charged a conspiracy to restrain interstate commerce in violation of the Sherman Act (15 U. S. C. A. Section 1).

Date of Judgment: July 28, 1943.

Brief description of judgment or sentence: The defendant was fined Three Thousand Dollars (\$3,000.00).

We, the above named appellant, do hereby appeal to the United States Circuit Court of Appeals for the Tenth Circuit from the judgment above-mentioned on the grounds set forth below.

SCHENLEY DISTILLERS CORPORATION,  
By IRA C. ROTHGERBER,

*Attorney-in-fact.*

Dated July 28, 1943.

*Grounds of Appeal*

The appellant contends that the second count of the indictment does not state facts constituting a crime committed by this appellant; that the second count of the indictment does not charge an offense under the Sherman Act for the reason that the acts charged in the second count of the indictment related to a commodity which had ceased to be in inter-state commerce and which was solely in intra-state commerce; that the second count of the indictment is fatally defective in that it does not charge an agreement among the defendants to accomplish an illegal act; that the second count of the indictment does not state facts sufficient to charge an offense under the Sherman Act committed by this appellant; that the allegations of the second count of the indictment are so vague, ambiguous, indefinite and uncertain as to be in violation of the Sixth Amendment to the Constitution of the United States; that the acts in the second count of the indictment charged to the appellant were performed under the sanction of the laws of the State of Colorado; that the sole jurisdiction over such acts was vested in the State of Colorado by the Constitution and Laws of the United States; that the trial court erred in the following respects: (a) In overruling the defendant's Demurrer to the Second Count of the Indictment; and (b) In overruling the defendant's Motion to Quash the Second Count of the Indictment.

ROBERT S. MARX,  
IRA C. ROTHGERBER,  
*Attorneys for the Appellant,  
Schenley Distillers Corporation.*

Filed United States District Court, Denver, Colorado, July 28, 1943. G. Walter Bowman, Clerk.

## In United States District Court

*Notice of Appeal*

Name and address of Appellant: Frankfort Distilleries, Inc., Louisville, Kentucky.

Names and addresses of Appellant's attorneys: Henry E. McElwain, Jr., Kentucky Home Life Building, Louisville, Kentucky; Robert G. Bosworth, Winston S. Howard, Pershing, Bosworth, Dick & Dawson, 520 Equitable Building, Denver, Colorado.

Offense: The second count of the indictment, on which the Government has elected to rely, charged a conspiracy to restrain interstate commerce in violation of the Sherman Act (15 U. S. C. A. Section 1).

Date of Judgment: July 28, 1943.

Brief description of judgment or sentence: The defendant was fined Three Thousand Dollars (\$3,000.00).

We, the above-named appellant, do hereby appeal to the United States Circuit Court of Appeals for the Tenth Circuit from the judgment above-mentioned on the grounds set forth below.

FRANKFORT DISTILLERS, INC.

By EARL N. WHITACRE.

Dated July 28, 1943.

*Grounds of Appeal*

The appellant contends that the second count of the indictment does not state facts constituting a crime committed by this appellant; that the second count of the indictment does not charge an offense under the Sherman Act for the reason that the acts charged in the second count of the indictment related to a commodity which had ceased to be in interstate commerce and which was solely in intrastate commerce; that the second count of the indictment is fatally defective in that it does not charge an agreement among the defendants to accomplish an illegal act; that the second count of the indictment does not state facts sufficient to charge an offense under the Sherman Act committed by this appellant; that the allegations of the second count of the indictment are so vague, ambiguous, indefinite and uncertain as to be in

68 violation of the Sixth Amendment to the Constitution of the United States; and that the acts in the second count of the indictment charged to the appellant were performed under the sanction of the laws of the State of Colorado; that the sole jurisdiction over such acts was vested in the State of Colorado by the Constitution and Laws of the United States; that the trial court erred in the following respects: (a) In overruling the de-

fendant's demurrer to the Second Count of the Indictment; and (b) In overruling the defendant's motion to quash the Second Count of the Indictment.

ROBERT G. BOSWORTH, WINSTON S. HOWARD,  
*Attorneys for Appellant, Frankfort Distilleries, Inc.*  
PERSHING, BOSWORTH, DICK & DAWSON,  
*Of Counsel.*

Field United States District Court, Denver, Colorado, July 28, 1943. G. Walter Bowman, Clerk.

In United States District Court

*Notice of Appeal*

Name and address of Appellant: McKesson & Robbins, Incorporated, Denver, Colorado.

Name and address of appellant's attorney: W. W. Grant, 730 Equitable Building, Denver, Colorado.

Offense: The second count of the indictment, on which the Government elected to rely, charged a conspiracy to restrain interstate commerce in violation of the Sherman Act (15 U. S. C. A. Section 1).

Date of Judgment: July 28, 1943.

Brief description of judgment or sentence: The defendant was fined Three thousand Dollars (\$3,000.00).

The above named appellant, does hereby appeal to the  
69 United States Circuit Court of Appeals for the Tenth Circuit from the judgment above-mentioned on the grounds set forth below.

[SEAL]

McKESSON & ROBBINS, INCORPORATED.  
By W. J. MURRAY, Jr.

Dated July 28, 1943.

*Grounds of Appeal*

The appellant contends that the second count of the indictment does not state facts constituting a crime committed by this appellant; that the second count of the indictment does not charge an offense under the Sherman Act for the reason that the acts charged in the second count of the indictment related to a commodity which had ceased to be in interstate commerce and which was solely in intrastate commerce; that the second count of the indictment is fatally defective in that it does not charge an agreement among the defendants to accomplish an illegal act; that the second count of the indictment does not state facts sufficient to charge an offense

under the Sherman Act committed by this appellant; that the allegations of the second count of the indictment are so vague, ambiguous, indefinite and uncertain as to be in violation of the Sixth Amendment to the Constitution of the United States; that the acts in the second count of the indictment charged to the appellant were performed under the sanction of the laws of the State of Colorado; that the sole jurisdiction over such acts was vested in the State of Colorado by the Constitution and Laws of the United States; that the trial court erred in the following respects: In overruling the defendant's Motion to Quash and Demurrer to the Second Count of the Indictment.

W. W. GRANT,

*Attorney for the Appellant,*

*McKesson & Robbins, Incorporated,*

*730 Equitable Building, Denver, Colorado.*

Filed United States District Court, Denver, Colorado, July 28, 1943. G. Walter Bowman, Clerk.

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In United States District Court

*Notice of Appeal*

Name and address of Appellant: National Distillers Products Corporation, 120 Broadway, New York City, N. Y.

Name and Address of Appellant's attorney: Hodges, Vidal & Goree, Wm. V. Hodges, and Henry C. Vidal, 947 Equitable Building, Denver 2, Colorado.

Offense: The second count of the indictment, on which the Government has elected to rely, charged a conspiracy to restrain interstate commerce in violation of the Sherman Act (15 U.S.C.A. Section 1).

Date of Judgment: July 28, 1943.

Brief description of judgment or sentence: The defendant was fined three thousand dollars (\$3,000).

The above named appellant does hereby appeal to the United States Circuit Court of Appeals for the Tenth Circuit from the judgment above mentioned on the grounds set forth below.

NATIONAL DISTILLERS PRODUCTS  
CORPORATION,

By WM. V. HODGES & HENRY C. VIDAL,

*Its attorneys.*

Dated July 28, 1943.

*Grounds of Appeal*

The appellant contends that the second count of the indictment does not state facts constituting a crime committed by this appel-

lant; that the second count of the indictment does not charge an offense under the Sherman Act for the reason that the acts charged in the second count of the indictment related to a commodity which had ceased to be in interstate commerce and which was solely in intrastate commerce; that the second count of the indictment is fatally defective in that it does not charge an agreement among the defendants to accomplish an illegal act; that the second count of

71 the indictment does not state facts sufficient to charge an offense under the Sherman Act committed by this appellant; that the allegations of the second count of the indictment are so vague, ambiguous, indefinite and uncertain as to be in violation of the Sixth Amendment to the Constitution of the United States; that the acts in the second count of the indictment charged to the appellant were performed under the sanction of the laws of the State of Colorado; that the sole jurisdiction over such acts was vested in the State of Colorado by the Constitution and laws of the United States; that the trial court erred in the following respects: (a) In overruling the defendant's Demurrer to the Second Count of the Indictment; and (b) in overruling the defendant's Motion to Quash the Second Count of the Indictment.

WM. V. HODGES,

HENRY C. VIDAL,

HODGES, VIDAL & GOREE,

*Attorneys for the Appellant,*

*National Distillers Products Corporation.*

Filed United States District Court, Denver, Colorado, July 28, 1943. G. Walter Bowman, Clerk.

#### In United States District Court

#### *Notice of Appeal*

Name and address of Appellant: Brown Forman Distillers Corporation, Louisville, Kentucky.

Name and address of Appellant's attorney: Dines, Dines & Holme, Robert E. More, 1210 First National Bank Building, Denver, Colorado.

Offense: The second count of the indictment, on which the Government has elected to rely, charged a conspiracy to restrain interstate commerce in violation of the Sherman Act (15 U. S. C. A. Section 1).

Date of Judgment: July 28, 1943.

Brief description of judgment or sentence: The defendant was fined Twenty-five hundred Dollars (\$2,500.00).



We, the above-named appellant, do hereby appeal to the United States Circuit Court of Appeals for the Tenth Circuit from the judgment above-mentioned on the grounds set forth below.

BROWN FORMAN DISTILLERS CORPORATION.

By LEO SULLIVAN.

Dated July 28, 1943.

*Grounds of Appeal*

The appellant contends that the second count of the indictment does not state facts constituting a crime committed by this appellant; that the second count of the indictment does not charge an offense under the Sherman Act for the reason that the acts charged in the second count of the indictment related to a commodity which had ceased to be in interstate commerce and which was solely in intrastate commerce; that the second count of the indictment is fatally defective in that it does not charge an agreement among the defendants to accomplish an illegal act; that the second count of the indictment does not state facts sufficient to charge an offense under the Sherman Act committed by this appellant; that the allegations of the second count of the indictment are so vague, ambiguous, indefinite and uncertain as to be in violation of the Sixth Amendment to the Constitution of the United States; that the acts in the second count of the indictment charged to the appellant were performed under the sanction of the laws of the State of Colorado; that the sole jurisdiction over such acts was vested in the State of Colorado by the Constitution and Laws of the United States; that the trial court erred in the following respects: (a) In overruling the defendant's Demurrer to the Second Count of the Indictment; and (b) In overruling the defendant's Motion to Quash the Second Count of the Indictment.

DINES, DINES & HOLME, ROBERT E. MORE,

*Attorneys for the Appellant.*

Filed United States District Court, Denver, Colorado, July 28, 1943. G. Walter Bowman, Clerk.

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In United States District Court

*Notice of Appeal*

Name and Address of Appellant: J. E. Speegle, Denver, Colorado.

Names and address of appellant's attorney: Morris Rifkin, 720 Symes Building, Denver, Colorado.

Offense: The second count of the indictment, on which the Government elected to rely, charged a conspiracy to restrain interstate commerce in violation of the Sherman Act (15 U. S. C. A., Section 1).

Date of Judgment: July 28, 1943.

Brief description of judgment or sentence: The defendant was fined Twenty-five hundred Dollars (\$2,500.00).

The above-named appellant, does hereby appeal to the United States Circuit Court of Appeals for the Tenth Circuit from the judgment above-mentioned on the grounds set forth below.

J. E. SPEEGLE.

Dated July 28, 1943.

*Grounds of Appeal*

The appellant contends that the second count of the indictment does not state facts constituting a crime committed by this appellant; that the second count of the indictment does not charge an offense under the Sherman Act for the reason that the acts charged in the second count of the indictment related to a commodity which had ceased to be an interstate commerce and which was solely in intrastate commerce; that the second count of the indictment is fatally defective in that it does not charge an agreement among the defendants to accomplish an illegal act; that the second count of the indictment does not state facts sufficient to charge an offense under the Serman Act committed by this appellant; that the allegations of the second count of the indictment are so vague, ambiguous, indefinite and uncertain as to be in violation of the Sixth Amendment to the Constitution of the United States; that the acts in the second count of the indictment charged to the appellant were performed under the sanction of the laws of the

State of Colorado; that the sole jurisdiction over such acts was vested in the State of Colorado by the Constitution and

Laws of the United States; that the trial court erred in the following respects: In overruling the defendant's Motion to Quash and Demurrer to the Second Count of the Indictment.

MORRIS RIFKIN.

*Attorney for Appellant.*

J. E. Speegle,

720 Symes Building, Denver, Colorado.

Filed United States District Court, Denver, Colorado, July 28, 1943. G. Walter Bowman, Clerk.

## In United States District Court

*Order Fixing Amount of Appearance Bond, etc.,  
as to Hiram Walker, Incorporated*

This matter coming on to be heard this twenty-eighth day of July 1943, for the purpose of fixing the terms of the escrow deposit referred to herein and the amount of the appearance bond of the defendant, **Hiram Walker, Inc.**, hereinafter referred to as the appellant, the said appellant being represented before this court by **Charles Rosenbaum**, its attorney; and the court having assessed a fine against the said appellant upon its plea of *nolo contendere* in the sum of Three Thousand Five Hundred Dollars (\$3,500.00);

It Is Hereby Ordered That the appearance bond of the said appellant is fixed in the amount of two hundred fifty dollars (\$250.00);

It is further ordered that the appellant deposit with the clerk of this court, on or before the 4th day of August 1943, cash in the sum of three thousand seven hundred fifty dollars (\$3,750.00), to be held by the clerk in escrow in the registry of the court until the determination of the appellant's appeal in the said cause, subject to further order of this court.

It is further ordered, that in the event the said sentence is reversed, the said total sum (less costs, if any) shall be returned to the said **Hiram Walker, Inc.**, upon order of this court.

It is further ordered, that in the event the said sentence is affirmed, the said sum of Three Thousand Seven Hundred Fifty

75 Dollars (\$3,750.00) shall be applied to the said judgment and in full payment of said fine, and so much of the said sum of Two Hundred Fifty Dollars (\$250.00) as shall be necessary to pay costs herein shall be applied to such costs, both in full payment of the judgment and sentence, and the balance thereof shall be paid to the said **Hiram Walker, Inc.**, upon order of this court.

It is further ordered, that the sum of two hundred fifty dollars (\$250.00) so deposited shall be security for the appearance bond of the said appellant filed herewith, and no surety shall be required on the said bond.

Done in open court the day and year first above mentioned.

By the court:

**J. FOSTER SYMES**, Judge.

Filed United States District Court, Denver, Colorado, July 28, 1943. **G. Walter Bowman**, Clerk.

Entered on the Docket July 28, 1943.

In United States District Court

*Order Fixing Amount of Appearance Bond etc.  
as to Seagram-Distillers Corporation*

This matter coming on to be heard this twenty-eighth day of July, 1943, for the purpose of fixing the terms of the escrow deposit referred to herein and the amount of the Appearance Bond of the defendant, Seagram-Distillers Corporation, hereinafter referred to as the appellant, the said appellant being represented before this court by W. W. Grant, its attorney; and the court having assessed a fine against the said appellant upon his plea of nolo contendere in the sum of Thirty-five hundred Dollars (\$3,500.00);

It Is Hereby Ordered, That the Appearance Bond of the said appellant is fixed in the amount of Two Hundred Fifty Dollars (\$250 00);

It Is Further Ordered, That the appellant deposit with the clerk of this court, on or before the 4th day of August, 1943, cash in the sum of Three Thousand Seven hundred fifty Dollars (\$3,750.00) to be held by the Clerk in escrow in the Registry  
76 of the Court until the determination of the appellant's appeal in the said cause, subject to further Order of this court.

It Is Further Ordered, That in the event the said sentence is reversed, the said total sum (less costs, if any) shall be returned to the said Seagram Distillers Corporation, upon Order of this court.

It Is Further Ordered, That in the event the said sentence is affirmed, the said sum of Thirty-five Hundred Dollars (\$3,500.00) shall be applied to the said judgment and in full payment of said fine, and so much of the said sum of Two Hundred Fifty Dollars (\$250.00) as shall be necessary to pay costs herein shall be applied to such costs, both in full payment of the judgment and sentence, and the balance thereof shall be paid to the said Seagram-Distillers Corporation upon Order of this court.

It Is Further Ordered, That the sum of Two Hundred Fifty Dollars (\$250.00) so deposited shall be security for the Appearance Bond of the said appellant filed herewith, and no surety shall be required on the said bond.

Done in open court the day and year first above mentioned.

By the court:

J. FOSTER SYMES, *Judge.*

Filed United States District Court, Denver, Colorado, July 28, 1943. G. Walter Bowman, Clerk.

Entered on the Docket July 28, 1943.

In United States District Court

*Order Fixing Amount of Appearance Bond etc. as to  
Schenley-Distillers Corporation*

This matter coming on to be heard this twenty-eighth day of July, 1943, for the purpose of fixing the terms of the escrow deposit referred to herein and the amount of the Appearance Bond of the defendant Schenley Distillers Corporation, hereinafter referred to as the appellant, the said appellant being represented before this

77 Court by Robert S. Marx and Ira C. Rothgerber, its attorneys; and the Court having assessed a fine against the said appellant upon his plea of nolo contendere in the sum of Three Thousand Dollars (\$3,000.00).

It is Hereby Ordered, That the Appearance Bond of the said appellant is fixed in the amount of Two Hundred Fifty Dollars (\$250.00);

It is Further Ordered, That the appellant deposit with the Clerk of this Court, on or before the 29th day of July, 1943, cash in the sum of Three Thousand Two Hundred Fifty Dollars (\$3,250.00) to be held by the Clerk in escrow in the Registry of the Court until the determination of the appellant's appeal in the said cause, subject to further Order of this Court.

It Is Further Ordered, That in the event the said sentence is reversed, the said total sum (less costs, if any) shall be returned to the said Schenley Distillers Corporation upon Order of this Court.

It Is Further Ordered, That in the event the said sentence is affirmed, the said sum of Three Thousand Dollars (\$3,000.00) shall be applied to the said judgment and in full payment of said fine, and so much of the said sum of Two hundred fifty dollars (\$250.00) as shall be necessary to pay costs herein shall be applied to such costs, both in full payment of the judgment and sentence, and the balance thereof shall be paid to the said Schenley Distillers Corporation upon Order of this Court.

It Is Further Ordered, That the sum of Two hundred fifty dollars (\$250.00) so deposited shall be security for the Appearance Bond of the said appellant filed herewith, and no surety shall be required on the said bond.

Done In Open Court, the day and year first above mentioned.

By the Court:

J. FOSTER SYMES, *Judge*.

Filed United States District Court, Denver, Colorado, July 29, 1943. G. Walter Bowman, Clerk.

Entered on the Docket July 29, 1943.

78 *Order Fixing Amount of Appearance Bond etc. as to  
Frankfort Distilleries, Inc.*

This matter coming on to be heard this twenty-eighth day of July, 1943, for the purpose of fixing the terms of the escrow deposit referred to herein and the amount of the Appearance Bond of the defendant, Frankfort Distilleries, Inc., hereinafter referred to as the appellant, the said appellant being represented before this court by Robert G. Bosworth, Winston S. Howard and Henry E. McElwain, Jr., its attorneys; and the court having assessed a fine against the said appellant upon its plea of nolo contendere in the sum of Three Thousand Dollars (\$3,000.00);

It Is Hereby Ordered, That the Appearance Bond of the said appellant is fixed in the amount of Two Hundred Fifty Dollars (\$250.00);

It Is Further Ordered, That the appellant deposit with the Clerk of this court, on or before the 4th day of August, 1943, cash in the sum of Three Thousand Two Hundred Fifty Dollars (\$3,250.00) to be held by the Clerk in escrow in the Registry of the court until the determination of the appellant's appeal in the said cause, subject to further Order of this court.

It Is Further Ordered, That in the event the said sentence is reversed, the said total sum (less costs, if any) shall be returned to the said Frankfort Distilleries, Inc., upon Order of this court.

It Is Further Ordered, that in the event the said sentence is affirmed, the said sum of Three Thousand Dollars (\$3,000.00) shall be applied to the said judgment and in full payment of said fine, and so much of the said sum of Two Hundred Fifty Dollars (\$250.00) as shall be necessary to pay costs herein shall be applied to such costs, both in full payment of the judgment and sentence, and the balance thereof shall be paid to the said Frankfort Distilleries, Inc., upon Order of this court.

It Is Further Ordered, that the sum of Two Hundred Fifty Dollars (\$250.00) so deposited shall be security  
79 for the Appearance Bond of the said appellant filed  
herewith, and no surety shall be required on the said bond.

Done in open court the day and year first above mentioned.

By the Court:

J. FOSTER SYMES, *Judge.*

Filed United States District Court Denver, Colorado, July 28, 1943. G. Walter Bowman, Clerk.

Entered on the Docket July 28, 1943.



<sup>a</sup> In United States District Court*Order Fixing Amount of Appearance Bond etc. as to  
McKesson & Robbins, Incorporated*

This matter coming on to be heard this twenty-eighth day of July, 1943, for the purpose of fixing the terms of the escrow deposit referred to her'in and the amount of the Appearance Bond of the defendant, McKesson & Robbins, Incorporated, herein-after referred to as the appellant, the said appellant being represented before this court by W. W. Grant, its attorney; and the court having assessed a fine against the said appellant upon his plea of nolo contendere in the sum of Three Thousand Dollars (\$3,000.00);

It Is Hereby Ordered, That the Appearance Bond of the said appellant is fixed in the amount of Two Hundred Fifty Dollars (\$250.00);

It Is Further Ordered, That the appellant deposit with the Clerk of this court, on or before the 4th day of August, 1943, cash in the sum of Three Thousand Dollars (\$3,000.00) to be held by the Clerk in escrow in the Registry of the court until the determination of the appellant's appeal in the said cause, subject to further Order of this court.

It Is Further Ordered, That in the event the said sentence is reversed, the said total sum (less costs, if any) shall be returned to the said McKesson & Robbins, Incorporated upon Order of this court.

80 It is Further Ordered, That in the event the said sentence is affirmed, the said sum of Three Thousand Dollars (\$3,000.00) shall be applied to the said judgment and in full payment of said fine, and so much of the said sum of Two Hundred Fifty Dollars (\$250.00) as shall be necessary to pay costs herein shall be applied to such costs, both in full payment of the judgment and sentence, and the balance thereof shall be paid to the said McKesson & Robbins, Incorporated upon Order of this court.

It is Further Ordered, That the sum of Two Hundred Fifty Dollars (\$250.00) so deposited shall be security for the Appearance Bond of the said appellant filed herewith, and no surety shall be required on the said bond.

Done in open court the day and year first above mentioned.

By the Court:

J. FOSTER SYMES, *Judge*.

Filed United States District Court, Denver, Colorado, July 28, 1943. G. Walter Bowman, Clerk.

Entered on the Docket July 28, 1943.

## In United States District Court

*Order Fixing Amount of Appearance Bond etc. as to National Distillers Products Corporation*

This matter coming on to be heard this twenty-tighth day of July, 1943, for the purpose of fixing the terms of the escrow deposit referred to herein and the amount of the appearance bond of the defendant National Distillers Products Corporation, hereinafter referred to as the appellant, the said appellant being represented before this court by Messrs. Hodges, Vidal & Goree, Wm. V. Hodges, and Henry C. Vidal, Esqs. his attorneys; and the court having assessed a fine against the said appellant upon his plea of nolo contendere in the sum of Three Thousand Dollars (\$3,000.00);

It is hereby ordered, that the appearance bond of the said appellant is fixed in the amount of Two Hundred Fifty Dollars (\$250.00);

It is further ordered, that the appellant deposit with the Clerk of this Court, on or before the 4th day of August, 1943, 81 cash in the sum of Three Thousand Two Hundred Fifty Dollars (\$3,250.00) to be held by the Clerk in escrow in the Registry of the court until the determination of the appellant's appeal in the said cause, subject to further order of this court.

It is further ordered, that in the event the said sentence is reversed, the said total sum (less costs, if any) shall be returned to the said National Distillers Products Corporation upon order of this court.

It is further ordered, that in the event the said sentence is affirmed, the said sum of three thousand dollars (\$3,000.00) shall be applied to the said judgment and in full payment of said fine, and so much of the said sum of Two Hundred fifty dollars (\$250.00) as shall be necessary to pay costs herein shall be applied to such costs, both in full payment of the judgment and sentence, and the balance thereof shall be paid to the said National Distillers Products Corporation upon order of this court.

It is further ordered, that the sum of Two Hundred Fifty Dollars (\$250.00) so deposited shall be security for the appearance bond of the said appellant filed herewith, and no surety shall be required on the said bond.

Done in open court the day and year first above mentioned.

By the Court:

J. FOSTER SYMES, *Judge*.

Filed United States District Court, Denver, Colorado, July 28, 1943. G. Walter Bowman, Clerk.

Entered on the Docket July 28, 1943.

## In United States District Court

*Order Fixing Amount of Appearance Bond etc. as to Brown Forman Distillers Corporation*

This matter coming on to be heard this twenty-eighth day of July 1943, for the purpose of fixing the terms of the escrow deposit referred to herein and the amount of the Appearance Bond of the defendant Brown Forman Distillers Corporation, hereinafter referred to as the appellant, the said appellant being represented before this court by Dines, Dines & Holme and Robert E. More, his attorneys; and the court having assessed a fine against the said appellant upon his plea of nolo contendere in the sum of Twenty-five Hundred Dollars (\$2,500.00);

It is Hereby Ordered, That the Appearance Bond of the said appellant is fixed in the amount of Two Hundred Fifty Dollars (\$250.00);

It Is Further Ordered, That the appellant deposit with the Clerk of this Court, on or before the 4th day of August, 1943, cash be held by the Clerk in escrow in the Registry of the court until the determination of the appellant's appeal in the said cause, subject to further Order of this court.

It Is Further Ordered, That in the event the said sentence is reversed, the said tital sum (less costs, if any) shall be returned to the said Brown Forman Distillers Corporation upon Order of this court

It Is Further Ordered, That in the event the said sentence is affirmed, the said sum of Twenty-five Hundred Dollars (\$2,500.00) shall be applied to the said judgment and in full payment of said fine, and so much of the said sum of Two Hundred Fifty Dollars (\$250.00) as shall be necessary to pay costs herein shall be applied to such costs, both in full payment of the judgment and sentence, and the balance thereof shall be paid to the said Brown Forman Distillers Corporation upon Order of this court.

It Is Further Ordered, That the sum of Two Hundred Fifty Dollars (\$250.00) so deposited shall be security for the Appearance Bond of the said appellant filed herewith, and no surety shall be required on the said bond.

Done in open court the day and year first above mentioned.

By the Court:

J. FOSTER SYMES, *Judge*.

Filed United States District Court, Denver, Colorado, July 28, 1943. G. Walter Bowman, Clerk.

Entered on the Docket July 28, 1943.

## In United States District Court

*Order Fixing Amount of Appearance Bond etc. as to  
J. E. Speegle*

This matter coming on to be heard this twenty-eighth day of July, 1943, for the purpose of fixing the terms of the escrow deposit referred to herein and the amount of the Appearance Bond of the defendant, J. E. Speegle, hereinafter referred to as the appellant, the said appellant being represented before this court by Morris Rifkin, his attorney; and the court having assessed a fine against the said appellant upon his plea of nolo contendere in the sum of Twenty-five hundred dollars (\$2,500.00);

It Is Hereby Ordered, That the Appearance Bond of the said appellant is fixed in the amount of Two Hundred Fifty Dollars (\$250.00);

It Is Further Ordered, That the appellant deposit with the Clerk of this court, on or before the 4th day of August, 1943, cash in the sum of Twenty-seven hundred fifty Dollars (\$2,750.00) to be held by the Clerk in escrow in the Registry of the Court until the determination of the appellant's appeal in the said cause, subject to further Order of this court;

It is Further Ordered, That in the event the said sentence is reversed, the said total sum (less costs, if any) shall be returned to the said J. E. Speegle upon Order of this court.

It Is Further Ordered, That in the event the said sentence is affirmed, the said sum of Twenty-five hundred Dollars (\$2,500.00) shall be applied to the said judgment and in full payment of said fine, and so much of the said sum of Two Hundred Fifty Dollars (\$250.00) as shall be necessary to pay costs herein shall be applied to such costs, both in full payment of the judgment and sentence, and the balance thereof shall be paid to the said J. E. Speegle upon Order of this court.

It is Further Ordered, That the sum of Two Hundred Fifty Dollars (\$250.00) so deposited shall be security for  
84 the Appearance Bond of the said appellant filed herewith, and no surety shall be required on the said bond.

Done in open court the day and year first above mentioned.  
By the court:

J. FOSTER SYMES, *Judge.*

Filed United States District Court, Denver, Colorado, July 28, 1943. G. Walter Bowman, Clerk.

Entered on the Docket July 28, 1943.

*Statement re appearance bonds*

[An approved appearance bond was filed by Hiram Walker, Incorporated, July 30, 1943. Approved appearance bonds were filed by Seagram Distillers Corporation and Schenley Distillers Corporation on July 28, 1943. An approved appearance bond was filed by Frankfort Distilleries, Inc., on August 3, 1943. An approved appearance bond was filed by McKesson & Robbins, Incorporated, on July 28, 1943. An approved appearance bond was filed by National Distillers Products Corporation on August 4, 1943. Approved appearance bonds were filed by Brown Forman Distillers Corporation and J. E. Speegle on July 28, 1943. Each of the appearance bonds is in the sum of \$250.00.]

## In United States District Court

*Order Extending Time for Filing Respective Assignments of Error*

Aug. 16, 1943

At this day comes Thomas J. Morrissey, Esquire, District Attorney, and George B. Haddock, Esquire, Special Assistant to the Attorney General, who prosecutes the above-entitled case; and the defendants Seagram-Distillers Corporation and McKesson & Robbins, Inc., by their attorney, W. W. Grant, Esquire; Frankfort Distilleries, Inc., by Robert G. Bosworth, Esquire, its attorney; Brown Forman Distillers Corporation, by Robert E.

More, Esquire, its attorney; Schenley Distillers Corporation, by Ira C. Rothgerber, Esquire, its attorney; J. E.

Speegle by Morris Rifkin, Esquire, his attorney; National Distillers Products Corporation, by W. V. Hodges, Esquire, its attorney; and Hiram Walker, Incorporated, by Ed Miller, Esquire, its attorney, also come.

And thereupon, it is ordered by the court that the appealing defendants have day and to and including the thirtieth day of September, A. D. 1943, within which to file their respective assignments of error herein.

Entered on the Docket August 26, 1943.

## In United States District Court

*Assignments of Error of Hiram Walker, Incorporated*

Comes now Hiram Walker, Incorporated, one of the above named defendants, by its attorneys, Charles Rosenbaum and Edward Miller, and assigns as error:

I. The Order of the Court overruling the said defendant's Demurrer to Count Two of the Indictment for the reasons that:

(a) The said Count of the Indictment does not state facts constituting a crime committed by this defendant;

(b) The second Count of the Indictment does not charge an offense under the Sherman Act for the reason that the acts charged in the second Count of the Indictment related to a commodity which had ceased to be in interstate commerce and which was solely in intrastate commerce;

(c) The second Count of the Indictment is fatally defective in that it does not charge an agreement among the defendants to accomplish an illegal act;

(d) The second Count of the Indictment does not state facts sufficient to charge an offense under the Sherman Act committed by this defendant;

(e) The allegations of the second Count of the Indictment are so vague, ambiguous, indefinite and uncertain as to be in violation of the Sixth Amendment to the Constitution of the United States;

(f) The acts in the second Count of the Indictment charged to the defendant were performed under the sanction of the laws of the State of Colorado;

(g) The sole jurisdiction over such acts was vested in the State of Colorado by the Constitution and Laws of the United States.

The Order of Court overruling the said defendant's Motion to Quash Count Two of the Indictment for the reasons that:

(a) The said Count of the Indictment does not state facts constituting a crime committed by this defendant;

(b) The second Count of the Indictment does not charge an offense under the Sherman Act for the reason that the acts charged in the second Count of the Indictment related to a commodity which had ceased to be in interstate commerce and which was solely in intrastate commerce;

(c) The second Count of the Indictment is fatally defective in that it does not charge an agreement among the defendants to accomplish an illegal act;

(d) The second Count of the Indictment does not state facts sufficient to charge an offense under the Sherman Act committed by this defendant;

(e) The allegations of the second Count of the Indictment are so vague, ambiguous, indefinite and uncertain as to be in violation of the Sixth Amendment to the Constitution of the United States;

(f) The acts in the second Count of the Indictment charged to the defendant were performed under the sanction of the laws of the State of Colorado;



(g) The sole jurisdiction over such acts was vested in the State of Colorado by the Constitution and Laws of the United States.

HIRAM WALKER, INCORPORATED,  
By CHARLES ROSENBAUM,  
EDWARD MILLER,  
*Its Attorneys, 930 University Building,  
Denver, Colorado.*

Filed United States District Court, Denver, Colorado, September 3, 1943. G. Walter Bowman, Clerk.

87 In United States District Court

*Assignments of Error of Seagram-Distillers Corporation*

Comes now Seagram-Distillers Corporation, one of the above-named defendants, by its attorneys, W. W. Grant and Morrison Shafroth, and assigns the following as error:

The Order of the Court overruling said defendant's demurrer and motion to quash, directed to Count Two of the Indictment, for the following reasons:

1. That Count Two of the Indictment does not state facts constituting a crime committed by this defendant.

2. That Count Two of the Indictment does not charge an offense under the Sherman Act for the reason that the acts charged in said Count relate to a commodity which had ceased to be in interstate commerce and was solely in intrastate commerce.

3. That Count Two of the Indictment is fatally defective in that it does not charge an agreement among the defendants to accomplish an illegal act.

4. Count Two of the Indictment is so vague, ambiguous, indefinite, and uncertain as to violate the Sixth Amendment to the Constitution of the United States.

5. The acts charged against the defendant in Count Two of the Indictment were done and performed under the sanction of the laws of the State of Colorado and the sole jurisdiction over such acts was vested in the State of Colorado by the Constitution and laws of the United States.

6. Count Two of the Indictment does not state facts sufficient to constitute an offense under the Sherman Act insofar as this defendant is concerned.

7. The allegations of Count Two of the Indictment with respect to venue are vague, indefinite, uncertain and insufficient and do not operate to fix Colorado as the locus of any specific act charged during the period covered by the Indictment.

8. Count Two of the Indictment fails to inform the defendants sufficiently of the crime with which they are charged in accordance with the requirements of the Fifth Amendment to the Constitution of the United States.

Wherefore, appellant prays that the judgment of the District Court be reversed and held for naught.

SEAGRAM-DISTILLERS CORPORATION,  
By W. W. GRANT,  
MORRISON SHAFROTH,  
*Attorneys for Appellant,*  
*730 Equitable Building, Denver, Colorado.*

Filed United States District Court, Denver, Colorado, August 26, 1943. G. Walter Bowman, Clerk.

In United States District Court

*Assignments of Error of Schenley Distillers Corporation*

Comes now Schenley Distillers Corporation, one of the above-named defendants, by its attorneys, Robert S. Marx and Ira C. Rothgerber, and assigns as error:

I. The Order of the Court overruling the said defendant's Demurrer to Count Two of the Indictment for the reasons that:

(a) The said Count of the Indictment does not state facts constituting a crime committed by this defendant;

(b) The second Count of the Indictment does not charge an offense under the Sherman Act for the reason that the acts charged in the second Count of the Indictment related to a commodity which had ceased to be in interstate commerce and which was solely in intrastate commerce;

(c) The second Count of the Indictment is fatally defective in that it does not charge an agreement among the defendants to accomplish an illegal act;

(d) The second Count of the Indictment does not state facts sufficient to charge an offense under the Sherman Act committed by this defendant;

89 (e) The allegations of the second Count of the Indictment are so vague, ambiguous, indefinite and uncertain as to be in violation of the Sixth Amendment to the Constitution of the United States;

(f) The acts in the second Count of the Indictment charged to the defendant were performed under the sanction of the laws of the State of Colorado;

(g) The sole jurisdiction over such acts was vested in the State of Colorado by the Constitution and Laws of the United States.

II. The Order of Court overruling the said defendant's Motion to Quash Count Two of the Indictment for the reasons that;

(a) The said Count of the Indictment does not state facts constituting a crime committed by this defendant;

(b) The second Count of the Indictment does not charge an offense under the Sherman Act for the reason that the acts charged in the second Count of the Indictment related to a commodity which had ceased to be in interstate commerce and which was solely in intrastate commerce;

(c) The second Count of the Indictment is fatally defective in that it does not charge an agreement among the defendants to accomplish an illegal act;

(d) The second Count of the Indictment does not state facts sufficient to charge an offense under the Sherman Act committed by this defendant;

(e) The allegations of the second Count of the Indictment are so vague, ambiguous, indefinite and uncertain as to be in violation of the Sixth Amendment to the Constitution of the United States;

(f) The acts in the second Count of the Indictment charged to the defendant were performed under the sanction of the laws of the State of Colorado;

90 (g) The sole jurisdiction over such acts was vested in the State of Colorado by the Constitution and Laws of the United States.

SCHENLEY DISTILLERS CORPORATION,

By ROBERT S. MARX,

*Cincinnati, Ohio.*

IRA C. ROTHGERBER,

*630 Symes Building, Denver, Colorado.*

Filed United States District Court, Denver, Colorado, September 25, 1943. G. Walter Bowman, Clerk.

In United States District Court

*Assignments of Error of Frankfort Distilleries, Incorporated*

Comes Now, Frankfort Distilleries, Incorporated, one of the above named defendants, by its attorneys, Henry E. McElwin, Jr., Robert G. Bosworth and Winston S. Howard, and assigns as error:

The Order of court overruling said defendants' Demurrer and Motion to Quash directed to Count 2 of the Indictment for the following reasons:

1. That said Count 2 of the Indictment does not state facts constituting a crime committed by this defendant.

2. That said Count 2 of the Indictment does not charge an

offense under the Sherman Act for the reason that the acts charged in said Count relate to a commodity which had ceased to be interstate commerce and was solely in intrastate commerce.

3. That said Count 2 of the Indictment is fatally defective in that it does not charge an agreement among the defendants to accomplish an illegal act.

4. That said Count 2 of the Indictment charges the commission of acts by this defendant which were done and performed  
91 under the sanction of the laws of the State of Colorado and the sole jurisdiction over such acts was vested in the State of Colorado by the Constitution and Laws of the United States.

5. That said Count 2 of the Indictment is so vague, ambiguous, indefinite and uncertain as to violate the Sixth Amendment to the Constitution of the United States.

6. That said Count 2 of the Indictment does not state facts sufficient to constitute an offense under the Sherman Act insofar as this defendant is concerned.

FRANKFORT DISTILLERIES, INCORPORATED,  
By HENRY E. McELWAIN, Jr.,  
*Address: Kentucky Home Life Building,*  
*Louisville, Kentucky,*

ROBERT G. BOSWORTH,  
WINSTON S. HOWARD,  
*Address: 520 Equitable Building, Denver, Colorado,*  
*Its Attorneys.*

Filed United States District Court, Denver, Colorado, September 21, 1943. G. Walter Bowman, Clerk.

### In United States District Court

#### *Assignments of Error of McKesson & Robbins, Incorporated*

Comes now McKesson & Robbins, Incorporated, one of the above named defendants, by its attorneys, W. W. Grant and Morrison Shafroth, and assigns the following as error:

92 The Order of the Court overruling said defendant's demurrer and motion to quash, directed to Count Two of the Indictment, for the following reasons:

1. That Count Two of the Indictment does not state facts constituting a crime committed by this defendant.

2. That Count Two of the Indictment does not charge an offense under the Sherman Act for the reason that the acts charged in said Count relate to a commodity which had ceased to be in interstate commerce and was solely in intrastate commerce.

3. That Count Two of the Indictment is fatally defective in that it does not charge an agreement among the defendants to accomplish an illegal act.

4. Count Two of the Indictment is so vague, ambiguous, indefinite, and uncertain as to violate the Sixth Amendment to the Constitution of the United States.

5. The acts charged against the defendant in Count Two of the Indictment were done and performed under the sanction of the laws of the State of Colorado and the sole jurisdiction over such acts was vested in the State of Colorado by the Constitution and laws of the United States.

6. Count Two of the Indictment does not state facts sufficient to constitute an offense under the Sherman Act insofar as this defendant is concerned.

7. The allegations of Count Two of the Indictment with respect to venue are vague, indefinite, uncertain and insufficient and do not operate to fix Colorado as the locus of any specific act charged during the period covered by the Indictment.

8. Count Two of the Indictment fails to inform the defendants sufficiently of the crime with which they are charged in accordance with the requirements of the Fifth Amendment to the Constitution of the United States.

93 Wherefore, appellant prays that the judgment of the District Court be reversed and held for naught.

McKESSON & ROBBINS, INCORPORATED,

By W. W. GRANT,

MORRISON SHAFROTH,

*Attorneys for Appellant,*

*730 Equitable Building, Denver, Colorado.*

Filed United States District Court, Denver, Colorado, August 26, 1943. G. Walter Bowman, Clerk.

#### In United States District Court

#### *Assignments of Error of National Distillers Products Corporation*

Comes now National Distillers Products Corporation, one of the above named defendants, by its attorneys, and assigns the following as a specification of errors committed by the trial court in this proceeding:

The Court erred in overruling this defendant's demurrer and motion to quash directed to Count Two of the indictment, for the following reasons:

1. That neither Section 1 of the Sherman Act nor any other Act of Congress defines as a crime against the United States any

act or acts charged in the indictment to have been done or participated in by the defendant.

2. That Count Two of the indictment does not state facts constituting a crime committed by this defendant.

3. That Count Two of the indictment does no charge any offense under the Sherman Act for the reason that the acts charged in said count related to a commodity which had ceased to be in interstate commerce and was solely in intrastate commerce.

4. That Count Two of the indictment is fatally defective in that it does not charge an agreement among the defendants to accomplish any illegal act.

94 5. That Count Two of the indictment is so vague, ambiguous, indefinite and uncertain as to violate the Sixth Amendment to the Constitution of the United States.

6. The acts charged against the defendant in Count Two of the indictment were done and performed under the sanction of the laws of the State of Colorado, and the sole jurisdiction over such acts was vested in the State of Colorado by the Constitution and laws of the United States.

NATIONAL DISTILLERS PRODUCTS  
CORPORATION.

By HODGES, VIDAL & GOREE,  
WM. V. HODGES,

*Its Attorneys,*  
947 Equitable Building, Denver, Colorado.

Filed: United States District Court, Denver, Colorado, Sept. 27, 1943. G. Walter Bowman, Clerk.

In United States District Court

*Assignments of Error of Brown Forman Distillers Corporation*

Comes now Brown Forman Distillers Corporation, one of the above named defendants, by its attorneys, Dines, Dines and Holme, and Robert E. More, and assigns as error:

I. The Order of the Court overruling the said defendant's Demurrer to Count Two of the Indictment, for the reasons that:

(a) The said Count of the Indictment does not state facts constituting a crime committed by this defendant;

(b) The second Count of the Indictment does not charge an offense under the Sherman Act for the reason that the acts charged in the second Count of the Indictment related to a commodity which had ceased to be in interstate commerce and which was solely in intrastate commerce;



(c) The second Count of the Indictment is fatally defective in that it does not charge an agreement among the defendants to accomplish an illegal act;

95 (d) The second Count of the Indictment does not state facts sufficient to charge an offense under the Sherman Act committed by this defendant;

(e) The allegations of the second Count of the Indictment are so vague, ambiguous, indefinite, and uncertain as to be in violation of the Sixth Amendment to the Constitution of the United States;

(f) The acts in the second Count of the Indictment charged to the defendant were performed under the sanction of the laws of the State of Colorado;

(g) The sole jurisdiction over such acts was vested in the State of Colorado by the Constitution and laws of the United States.

II. The Order of Court overruling the said defendant's Motion to quash Count Two of the Indictment for the reasons that—

(a) The said Count of the Indictment does not state facts constituting a crime committed by this defendant;

(b) The second Count of the Indictment does not charge an offense under the Sherman Act for the reason that the acts charged in the second Count of the Indictment related to a commodity which had ceased to be in interstate commerce and which was solely in intrastate commerce;

(c) The second Count of the Indictment is fatally defective in that it does not charge an agreement among the defendants to accomplish an illegal act;

(d) The second Count of the Indictment does not state facts sufficient to charge an offense under the Sherman Act committed by this defendant;

(e) The allegations of the second Count of the Indictment are so vague, ambiguous, indefinite, and uncertain as to be in violation of the Sixth Amendment to the Constitution of the United States;

(f) The acts in the second Count of the Indictment charged to the defendant were performed under the sanction of the laws of the State of Colorado;

96 (g) The sole jurisdiction over such acts was vested in the State of Colorado by the Constitution and Laws of the United States.

BROWN FORMAN DISTILLERS  
CORPORATION.

By DINES, DINES & HOLME,  
ROBERT E. MORE,

*Its Attorneys,*

*1210 First National Bank Bldg., Denver 2, Colorado.*

Filed: United States District Court, Denver, Colorado, Sep.  
22, 1943. G. Walter Bowman, Clerk.

In United States District Court  
*Assignments of Error of J. E. Speegle*

Comes now J. E. Speegle, one of the above-named defendants, by his attorneys, W. W. Grant and Morris Rifkin, and assigns the following as error:

The Order of the Court overruling said defendant's demurrer and motion to quash directed to Count Two of the Indictment, for the following reasons:

1. That Count Two of the Indictment does not state facts constituting a crime committed by this defendant.

2. That Count Two of the Indictment does not charge an offense under the Sherman Act for the reason that the acts charged in said Count relate to a commodity which had ceased to be in interstate commerce and was solely in intrastate commerce.

3. That Count Two of the Indictment is fatally defective in that it does not charge an agreement among the defendants to accomplish an illegal act.

4. Count Two of the Indictment is so vague, ambiguous, indefinite, and uncertain as to violate the Sixth Amendment to the Constitution of the United States.

5. The acts charged against the defendant in Count Two of the Indictments were done and performed under the sanction of the laws of the State of Colorado, and the sole jurisdiction over such acts was vested in the State of Colorado by the Constitution and laws of the United States.

97 6. Count Two of the Indictment does not state facts sufficient to constitute an offense under the Sherman Act insofar as this defendant is concerned.

7. The allegations of Count Two of the Indictment with respect to venue are vague, indefinite, uncertain, and insufficient and do not operate to fix Colorado as the locus of any specific act charged during the period covered by the Indictment.

8. Count Two of the Indictment fails to inform the defendants sufficiently of the crime with which they are charged in accordance with the requirement of the Fifth Amendment to the Constitution of the United States.

Wherefore, appellant prays that the judgment of the District Court be reversed and held for naught.

J. E. SPEEGLE,

By W. W. GRANT,

*Attorney for Appellant,*

*730 Equitable Building, Denver, Colorado.*

MORRIS RIFKIN,

*Attorney for Appellant,*

*Symex Building, Denver, Colorado.*

Filed: United States District Court, Denver, Colorado, Aug. 26, 1943. G. Walter Bowman, Clerk.

## In United States District Court

*Stipulation As to Transcript of Record*

Whereas, the following defendants were indicted jointly in the above-entitled action, and judgment and sentence was entered against each on July 28, 1943, namely: J. E. Speegle, McKesson & Robbins, Incorporated, Hiram Walker, Incorporated, Seagram-Distillers Corporation, Schenley Distillers Corporation, National Distillers Products Corporation, Brown Forman Distillers Corporation, and Frankfort Distillers, Inc.; and

Whereas each of said defendants has filed a separate appeal and said appeals have been docketed separately upon the records of the United States Circuit Court of Appeals for the Tenth Circuit;

Now, therefore, in view of the premises, it is stipulated and agreed by and between each of the above-named defendants-appellants, by their counsel, and the United States of America, appellee, by Thomas J. Morrissey, Esq., United States District Attorney for the District of Colorado, and George B. Haddock, Esq., Special Assistant to the Attorney General, as follows:

1. That the appeals of all of the above-named defendants-appellants may be presented to the United States Circuit Court of Appeals for the Tenth Circuit upon one transcript of record.

2. That the said transcript of record shall include the following:

(a) The indictment.

(b) The several motions to quash, filed on behalf of each of said defendants-appellants.

(c) The Court's rulings thereon.

(d) The demurrer filed on behalf of each of said defendants-appellants.

(e) The Court's rulings thereon.

(f) The memorandum opinion of the Court overruling the motions to quash and demurrers aforesaid.

(g) The order of the Court requiring the government to elect between the two counts of the indictment.

(h) The election of the government.

(i) The order of the Court quashing Count 1 of the indictment.

(j) The separate pleas of each of the above defendants-appellants and the judgment against and sentence as to each one.

(k) The notice of appeal of each of said defendants-appellants, and order approving appearance bond.

It is further stipulated and agreed that each of said  
 99 defendants-appellants shall file its separate assignments of  
 error by September 30, 1943, the time having been fixed by  
 order of Court of August 16, 1943.

J. E. Speegle, by Morris Rifkin; McKesson & Robbins,  
 Incorporated, by W. W. Grant, by Morris on Shaffroth;  
 Brown Forman Distillers Corporation, by Dines, Dines  
 & Holme, by Robert E. More; Frankfort Distillers,  
 Incorporated, by Robert G. Bosworth, by Winston H.  
 Howard; Hiram Walker, Incorporated, by Charles  
 Rosenbaum, by Edward Miller; National Distillers  
 Products Corporation, by Hodges, Vidal & Goree, by  
 Wm. V. Hodges; Schenley Distillers Corporation, by  
 Ira C. Rothgerber; Seagram-Distillers Corporation, by  
 W. W. Grant, by Morrison Shaffroth; United States of  
 America, by Thomas J. Morrissey, United States District  
 Attorney for the District of Colorado; Geo. B. Haddock,  
 Special Assistant to the United States Attorney General.

Filed United States District Court, Denver, Colorado, August  
 26, 1943—G. Walter Bowman, Clerk.

#### In United States District Court

#### *Order Approving Stipulation as to Record on Appeal*

Aug. 26, 1943

100 At this day come the defendants, J. E. Speegle, McKes-  
 son & Robbins, Incorporated; Hiram Walker, Incorporated;  
 Seagram Distillers Corporation; Schenley Distillers Cor-  
 poration; National Distillers Products Corporation; Brown For-  
 man Distillers Corporation and Frankfort Distillers, Inc., by  
 W. W. Grant, Esquire, their attorney, and present to the Court  
 now here the Stipulation as to Transcript of Record, entered  
 into between the said defendants and The United States of  
 America. And thereupon, upon consideration thereof:

It is ordered by the Court that the said stipulation of the  
 appealing defendants as to the transcript of record, be, and it  
 is hereby approved.

Entered on the docket August 26, 1943.

[Clerk's certificate to foregoing transcript omitted in printing.]

And thereafter the following proceedings were had in said cause in the United States Circuit Court of Appeals for the Tenth Circuit:

Order of Submission, Jan. 18, 1944

Second Day, January Term, Tuesday, January 18th, A. D. 1944. Before Honorable Orie L. Phillips, Honorable Sam G. Bratton, and Honorable Alfred P. Murrah, Circuit Judges.

These causes came on to be heard, W. W. Grant, Esquire, appearing for appellants in cases Numbers 2797, 2798, and 2799; Robert S. Marx, Esquire, appearing for appellant in case No. 2796; William V. Hodges, Esquire, appearing for appellant in case No. 2793; Charles Rosenbaum, Esquire, appearing for appellants in cases Numbers 2794 and 2795; George B. Haddock, Esquire, appearing for United States of America.

On motion, Schenley Distillers Corporation, appellant in case No. 2796, was granted leave to file four typewritten copies of a reply brief instantan, which was accordingly done.

Thereupon these causes were argued by counsel and were submitted to the court.

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Judgment, Case No. 2792, Feb. 28, 1944

Twentieth Day, January Term, Monday, February 28th, A. D. 1944. Before Honorable Orie L. Phillips, Honorable Sam G. Bratton, and Honorable Alfred P. Murrah, Circuit Judges.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the District of Colorado and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this court that the judgment and sentence of the said district court in this cause be and the same is hereby reversed; and that this cause be and the same is hereby remanded to the said district court with directions to dismiss the indictment as to appellant.

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Judgment, Case No. 2793, Feb. 28, 1944

Twentieth Day, January Term, Monday, February 28th, A. D. 1944. Before Honorable Orie L. Phillips, Honorable Sam G. Bratton, and Honorable Alfred P. Murrah, Circuit Judges.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the District of Colorado and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this court that the judgment and sentence of the said district

court in this cause be and the same is hereby reversed; and that this cause be and the same is hereby remanded to the said district court with directions to dismiss the indictment as to appellant.

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**Judgment, Case No. 2794, Feb. 28, 1944**

Twentieth Day, January Term, Monday, February 28th, A. D. 1944. Before Honorable Orie L. Phillips, Honorable Sam G. Bratton, and Honorable Alfred P. Murrah, Circuit Judges.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the District of Colorado and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this court that the judgment and sentence of the said district court in this cause be and the same is hereby reversed; and that this cause be and the same is hereby remanded to the said district court with directions to dismiss the indictment as to appellant.

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**Judgment, Case No. 2795, Feb. 28, 1944**

Twentieth Day, January Term, Monday, February 28th, A. D. 1944. Before Honorable Orie L. Phillips, Honorable Sam G. Bratton, and Honorable Alfred P. Murrah, Circuit Judges.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the District of Colorado and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this court that the judgment and sentence of the said district court in this cause be and the same is hereby reversed; and that this cause be and the same is hereby remanded to the said district court with directions to dismiss the indictment as to appellant.

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**Judgment, Case No. 2796, Feb. 28, 1944**

Twentieth Day, January Term, Monday, February 28th, A. D. 1944. Before Honorable Orie L. Phillips, Honorable Sam G. Bratton, and Honorable Alfred P. Murrah, Circuit Judges.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the District of Colorado and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this court that the judgment and sentence of the said district

court in this cause be and the same is hereby reversed; and that this cause be and the same is hereby remanded to the said district court with directions to dismiss the indictment as to appellant.

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**Judgment, Case No. 2797, Feb. 28, 1944**

Twentieth Day, January Term, Monday, February 28th, A. D. 1944. Before Honorable Orie L. Phillips, Honorable Sam G. Bratton, and Honorable Alfred P. Murrah, Circuit Judges.

On consideration whereof, it is now here ordered and adjudged by this court that the judgment and sentence of the said district court in this cause be and the same is hereby reversed; and that this cause be and the same is hereby remanded to the said district court with directions to dismiss the indictment as to appellant.

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**Judgment, Case No. 2798, Feb. 28, 1944**

Twentieth Day, January Term, Monday, February 28th, A. D. 1944. Before Honorable Orie L. Phillips, Honorable Sam G. Bratton, and Honorable Alfred P. Murrah, Circuit Judges.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the District of Colorado and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this court that the judgment and sentence of the said district court in this cause be and the same is hereby reversed; and that this cause be and the same is hereby remanded to the said district court with directions to dismiss the indictment as to appellant.

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**Judgment, Case No. 2799, Feb. 28, 1944**

Twentieth Day, January Term, Monday, February 28th, A. D. 1944. Before Honorable Orie L. Phillips, Honorable Sam G. Bratton, and Honorable Alfred P. Murrah, Circuit Judges.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the District of Colorado and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this court that the judgment and sentence of the said district court in this cause be and the same is hereby reversed; and that this cause be and the same is hereby remanded to the said district court with directions to dismiss the indictment as to appellant.



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On March 10, 1944, the mandate of the United States Circuit Court of Appeals in each case, in accordance with the opinion and judgments of said court, was issued to the United States District Court.

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Pursuant to the order of the United States Circuit Court of Appeals the mandates issued March 10, 1944, were recalled.

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Order Vacating Judgment of February 28, 1944, etc., Case No. 2792

Thirty-sixth Day, January Term, Saturday, March 25th, A. D. 1944. Before Honorable Orie L. Phillips, Honorable Sam G. Bratton, and Honorable Alfred P. Murrah, Circuit Judges.

This cause came on to be heard on the court's own motion to vacate the judgment entered herein on February 28, 1944.

It is now here ordered by the court that the judgment entered herein on February 28, 1944, be and the same is hereby vacated, set aside and held for naught.

It is further ordered by the court that this cause be set for re-argument limited to the question of whether the second count of the indictment charges the offenses set out with sufficient particularity.

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[Orders identical with that entered in case No. 2792, vacating the judgments entered February 28, 1944, in cases Nos. 2793 to 2799, inclusive, were entered March 25, 1944.]

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Order of Submission, April 24, 1944

First Day, Special April Term, Monday, April 24th, A. D. 1944. Before Honorable Orie L. Phillips, Honorable Sam G. Bratton, Honorable Walter A. Huxman, and Honorable Alfred P. Murrah, Circuit Judges.

These causes came on to be heard, Holmes Baldridge, Esquire, and George B. Haddock, Esquire, appearing for United States of America; Henry N. Ess, Esquire, appearing for Safeway Stores, Incorporated (Maryland), et al.; Robert S. Marx, Esquire, and T. M. Lillard, Esquire, appearing for The Kroger Grocery & Baking Company et al.; W. W. Grant, Esquire, appearing for Frankfort Distilleries, Inc., et al.

Thereupon argument was commenced by counsel and continued to the hour of adjournment.

Order of Submission, April 25, 1944

Second Day, Special April Term, Tuesday, April 25th, A. D. 1944. Before Honorable Orie L. Phillips, Honorable Sam G. Bratton, Honorable Walter A. Huxman, and Honorable Alfred P. Murrah, Circuit Judges.

These causes came on further to be heard, Holmes Baldridge, Esquire, and George B. Haddock, Esquire, appearing for United States of America; Henry N. Ess, Esquire, appearing for Safeway Stores, Incorporated (Maryland), et al.; Robert S. Marx, Esquire, and T. M. Lillard, Esquire, appearing for The Kroger Grocery & Baking Company et al.; W. W. Grant, Esquire, appearing for Frankfort Distilleries, Inc., et al.

Thereupon argument by counsel was concluded and the causes were submitted to the court.

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Opinion August 26, 1944

Before Phillips, Bratton, Huxman, and Murrah, Circuit Judges

*BRATTON, Circuit Judge:*

These are three criminal prosecutions for combining and conspiring, in some courts to restrain interstate trade and commerce, and in others to monopolize such trade and commerce, in violation of the Sherman Act, as amended, 26 Stat. 209, 50 Stat. 693, 15 U. S. C. A. §§ 1, 2. The cases were submitted on rehearing to the full court. The opinions previously announced, for the unanimous court in one instance and for the majority in the other, are withdrawn and the following is substituted in lieu of them.

The indictment in Numbers 2792 to 2799, inclusive, containing two counts, was returned in the United States Court for Colorado against twenty-nine corporations and fifty-four individuals. Nineteen of the corporations are engaged in the production of alcoholic beverages outside of Colorado; eight are wholesalers engaged in the business in Colorado of purchasing alcoholic beverages for resale to retailers; one is a wholesale association, the members of which are wholesalers doing business in the state, hereinafter referred to as Wholesale Association; and one is a retail association, the members of which are retailers engaged in business in the state, hereinafter called Package Association. Some of the individuals are or were officers or employees of the defendant producers; some are or were officers or employees of the defendant wholesalers; and some are engaged in the sale and distribution at retail of alcoholic beverages in Colorado. The first count was dismissed.

The second count charges a conspiracy to raise, fix, and maintain the retail prices of alcoholic beverages shipped into Colorado. It defines certain terms and delineates the facts with respect to the several defendants as to being producer, wholesaler, retailer, officer, or employee, respectively. It contains a description of the nature of the trade and commerce involved. Under this head, it sets out that alcoholic beverages are marketed in Colorado by means of a continuous flow of shipments from producers located outside the state through wholesalers and retailers to the consuming public; that beverages shipped and sold in bottles by producers can be sold to retailers there only by wholesalers licensed under the laws of that state; that wholesalers and retailers are conduits through which beverages are shipped into the state and sold and distributed to the consuming public; that more than ninety-eight per cent of the spirituous liquor, more than eighty per cent of the wine, and substantial amounts of beer, consumed in Colorado are produced elsewhere and shipped into the state for sale and distribution; that alcoholic beverages are distributed to more than 700 retailers in the state by approximately twenty-eight wholesalers; that more than seventy-five per cent of the spirituous liquor and wine, and substantial quantities of beer, are sold and distributed by the defendant wholesalers; and that all of the liquor and wine, and substantial quantities of beer, sold and distributed by the bottle or case to the consuming public, are sold by retailers, including the defendant retailers and other members of the defendant Package Association. It is then charged that beginning about January, 1936, and continuing to the time of the presentation of the indictment, the defendants combined and conspired to raise, fix, and maintain the retail prices of alcoholic beverages shipped into Colorado from producers located outside the state, by raising, fixing, and stabilizing retail mark-ups and margins of profit; that it was a part of the combination and conspiracy that the defendants from time to time discuss, agree upon, and adopt high, arbitrary, and non-competitive retail prices, markups, and margins of profit; that the defendants Wholesale Association and Package Association, wholesalers, and retailers agree upon and undertake to persuade, induce, and compel producers, including the defendant producers, and wholesalers, to enter into fair trade contracts affecting every type and brand of alcoholic beverage shipped into Colorado and to establish in and by such contracts high, arbitrary, and artificial, retail prices embodying the high, arbitrary, and non-competitive margins of profit agreed upon; that the defendant Package Association prepare and adopt forms of fair trade contracts acceptable to the defendant retailers and to the other members of the association; that the defendant Pack-

age Association agree with producers and wholesalers on the forms of fair trade contracts to be used by such producers and wholesalers, and prepare and circulate among its members bulletins and notices announcing the adoption of fair trade contracts and giving the names of producers and wholesalers entering into them and also the names of those not doing so; that the defendant retailers, through the defendant Package Association, agree to and do patronize only those producers and wholesalers who enter into fair trade contracts embodying such retail prices, mark-ups, and margins of profit, and who require and compel observance of the minimum retail prices established in that manner, agree to and do withhold their patronage from producers and wholesalers who fail or refuse to enter into such fair trade contracts, and agree from time to time with producers and wholesalers respecting revisions in the retail prices established in and by such fair trade contracts so as to preserve and maintain the retail mark-ups and margins of profit. It is further charged that the defendants, acting in part through the defendants Wholesale Association and Package Association, agree to and do police the high, arbitrary, and non-competitive retail prices, mark-ups, and margins of profit, and require and secure observance of them; that they agree to and do employ paid executives and investigators to spy upon and embarrass retailers who fail or refuse to observe such retail prices, mark-ups and margins of profit, and threaten to and do institute and cause to be instituted legal proceedings against such retailers who fail or refuse to observe such prices, mark-ups, and margins of profit. It is also charged that the defendant retailers agree among themselves and with the defendant producers and the defendant wholesalers that retailers selling at prices lower than those established in the fair trade contracts be deprived of the opportunity to purchase beverages from the defendant producers and the defendant wholesalers; that the defendant retailers threaten to and do boycott producers and wholesalers who supply their products to retailers failing or refusing to observe the retail prices, mark-ups, and margins of profit; that in order to reduce price competition among retailers, defendant retailers, acting in part through defendant Package Association, agree and attempt to persuade and induce the authorized officials of Colorado, and of the City and County of Denver, to reject applications for retail liquor licenses; and that for the purpose of financing such activities, defendants agree upon and provide for the collection of an extra charge added to the wholesale price, the proceeds to be paid to the Wholesale Association and that it then pay a portion of such proceeds to the Package Association. And it is charged that the effect of the combination and conspiracy has been to raise, fix, sta-

bilize, and maintain the retail prices of alcoholic beverages shipped in interstate commerce into Colorado and sold and distributed in that state at levels acceptable to the defendants, to eliminate price competition among the defendant retailers, to eliminate price competition among the members of the Package Association, and to restrain and suppress interstate trade and commerce in alcoholic beverages not covered by fair trade contracts.

After their demurrers and motions to quash the indictment had been denied, the defendants Frankfort Distilleries, Inc., National Distillers Products Corporation, Brown Forman Distillers Corporation, Hiram Walker, Incorporated, Schenley Distillers Corporation, Seagram-Distillers Corporation, McKesson & Robbins, Incorporated, and J. E. Speegle each entered a plea of nolo contendere and prayed that the court impose sentence in all things as though a plea of guilty had been interposed. Fines were imposed, and separate appeals were perfected.

The indictment in Number 2807, containing two counts was returned in the United States Court for Kansas against Safeway Stores, Inc., incorporated in Maryland, Safeway Stores, Inc., incorporated in California, Safeway Stores, Inc., incorporated in Nevada, Safeway Stores, Inc., incorporated in Texas, Arizona Grocery Company, Sanitary Grocery Company, Dwight Edwards Company, The Lucerne Cream and Butter Company, Sutter Packing Company, and certain individuals being officers of such corporations, respectively.

The first count sets out that the defendant Safeway Stores, Inc., incorporated in Maryland, is a holding company and owns and controls all of the authorized and issued stock of the other corporate defendants, the time and manner of the acquisition being detailed; that in 1926 the Safeway group owned and operated in the United States 673 food stores, of which 120 were equipped with meat markets, and had sales of \$50,536,514; that in 1932, the group owned and operated in the United States and Canada 3411 stores in which were located 2066 markets, and its sales amounted to \$229,173,468; that in 1939, it owned and operated in the United States and Canada 2967 stores in which 2643 markets were located, and its sales were \$385,882,083; that at the end of 1941, it owned and operated in the United States about 2850 stores of which about 2500 had markets; that its sales for that year totaled \$423,787,700.21; that it had fifty-two principal warehouses, nineteen bakeries, seven creameries, and seven coffee roasting plants; that the wholesale warehouses and retail stores were divided into fourteen geographical divisions and the divisions subdivided into fifty-eight districts, the names of the divisions and districts, the number of warehouses, groceries, and bakeries in each being stated in detail; that the members of the group together

constitute the second largest manufacturers, processors, wholesalers, and retail distributors of food and food products in the United States; and that in addition to manufacturing, processing, canning, and packing food and food products for sale in its retail stores, the group obtains fresh fruits and vegetables from jobbers in various markets where they are located and ships them in interstate commerce to its warehouses which in turn distribute them to its retail stores for sale to consumers. It is further set out that by virtue of the horizontal and vertical integration of the functions and business of the group, and the centralization of the control thereof, the defendants have exercised the power to dominate and control the production, prices, and distribution of a substantial part of the food and food products produced, marketed, sold, and consumed in the United States.

It is then charged that for many years prior to the return of the indictment, and continuously up to its presentment, the defendants and others to the grand jury unknown entered into a combination and conspiracy to restrain interstate trade and commerce in food and food products, produced, distributed, and sold in many states. It is further charged that such combination and conspiracy consists of a continuing agreement and concert of action in acquiring by merger and otherwise the business of independent retail grocers and local chains; selecting local areas in which defendants use their dominant advantage to injure and destroy the competition of independent grocers, meat dealers, and small local food stores, by selling at retail in those areas sufficiently lower than elsewhere until control or the desired percentage of total retail business is obtained, using income from other areas and from operations other than retail to offset the losses or reductions in profits incident to such price cutting; combining with other national food chains operating in such selected areas to fix, maintain, and follow the prices established by the defendants; systematically preventing competition in selected trade areas, by combining with independent grocers and local and national food chains operating in such selected areas to fix retail prices and terms of sale of food, and by combining with manufacturers of food and food products and others to fix and maintain the resale prices and policies in such selected areas and to aid and assist such manufacturers and others in enforcing the prices fixed and established; obtaining and maintaining for themselves a systematic discriminatory buying preference over competitors by coercing suppliers to sell to other wholesalers and retailers on terms and conditions dictated by defendants, coercing suppliers—through threats of withdrawal of their patronage and otherwise—secretly to maintain two price structures on their products, the lower of which would be charged to defendants and the higher to their competitors, requiring sup-



pliers to give defendants secret preferential discounts and secret protection against price increases and declines, coercing suppliers to discontinue selling direct to their competitors while secretly continuing to sell direct to defendants at lower prices, inducing suppliers to divert a large portion of their plants and facilities to filling orders of defendants and then threatening to withdraw their patronage unless secretly given lower prices and large discounts, bidding in fresh fruits and produce at public auction on the secret understanding with the owner that settlement would be made at a lower price than that bid, coercing suppliers to grant preferential rebates by various pretexts unrelated to any actual saving or service to the supplier; systematically exacting from suppliers arbitrarily fixed rebates called "advertising" and "promotional" allowances for pretended services, demanding discounts and allowances for so-called "floor space rentals," "Store Sales Service," "feature payments," "label and container allowances," "Sign space rentals," and "mass displays" for mere pretended service; and fostering false comparisons of their prices with the prices charged by competitors and false reports calculated to conceal their activities and perpetuate their dominance and control of the distribution of food and food products; inspiring and publishing statements calculated and intended to foster such false comparisons, organizing, financing, and preparing publicity and propaganda for false front farmer, consumer, and housewife organizations and using the statements of such organizations in support of such false comparisons, and the systematic practice of secretly enhancing their actual prices above the advertised prices through short-changing, short-weighing, and marking up prices on store tags and purchases. And it is charged that the effect of such combination and conspiracy has been unreasonably to restrain a large part of the interstate trade and commerce in food and food products.

With minor exceptions which do not have any material bearing here, the second count charges the same facts as a conspiracy to monopolize trade and commerce, injure food manufacturers, processors, canners, wholesalers, and retail dealers, depress prices paid growers of fruits, vegetables, and other farm products, vest in defendants dominance and control of the distribution of food and food products in many of the largest trade areas in the United States, and make it impossible for any one not similarly integrated to enter or remain in competition with defendants.

The trial court sustained in part a demurer to the indictment, treated the infirmities as fatal, and dismissed the indictment as to the demurring defendants. The United States appealed.

The indictment in Number 2808, containing two counts, was also returned in the United States Court for Kansas. It was against



The Kroger Grocery & Baking Company, Wesco Foods Company, The Colter Company, Pay'n Takit, Inc., and certain individuals being officers of the corporations, respectively. It sets out that The Kroger Grocery & Baking Company owns the stock in the other corporate defendants, and in addition has acquired through merger and otherwise the business of forty-nine independent and local chains, the names, locations, dates of acquisition, and number of stores aggregating 2317, being detailed; and that the members of the group together constitute the third largest manufacturers, processors, wholesalers, and retail distributors of food and food products in the United States. It further sets forth the number and location of the processing plants and stores operated, and the location and volume of business transacted. The first count charges a conspiracy to restrain interstate trade and commerce in food and food products, produced, distributed, and sold in many states, and the second count charges a like conspiracy to monopolize such trade and commerce. The indictments in the two cases in Kansas are substantially alike in their material features.

In this case, the trial court similarly sustained in part a demurrer to the indictment, regarded the defects as fatal, and dismissed the indictment as to the demurring defendants. From the order of dismissal, the United States appealed.

One ground of demurrer in each case, denied by the court in Colorado, and sustained by the court in Kansas, was that the indictment was bad for vagueness, indefiniteness, and uncertainty. It is too well settled for doubt that an indictment is not objectionably vague, indefinite, and uncertain if it charges all of the essential elements of the offense with sufficient fullness, clarity, and particularity to advise the accused of the nature of the accusation against him, to enable him to prepare his defense, and to enable him to plead the judgment and record of acquittal or conviction in bar to a subsequent prosecution for the same offense. *Econs v. United States*, 153 U. S. 584; *Cochran and Sayre v. United States*, 157 U. S. 286; *Rosen v. United States*, 161 U. S. 29; *Bartell v. United States*, 227 U. S. 427; *United States v. Behrman*, 258 U. S. 280; *Wong Tai v. United States*, 273 U. S. 77; *Hagner v. United States*, 285 U. S. 427; *Weber v. United States*, 80 F. (2d) 687; *Crapo v. United States*, 100 F. (2d) 996; *Graham v. United States*, 120 F. (2d) 543; *Rose v. United States*, 128 F. (2d) 622; *United States v. Armour & Co.*, 137 F. (2d) 269.

Ordinarily it is not sufficient to charge the offense in the words of the statute creating the offense, unless such words themselves fully, directly, and expressly, without uncertainty or ambiguity, set forth all the essential elements necessary to constitute the crime intended to be punished. *United States v. Carll*, 105 U. S. 611; *United States v. Britton*, 107 U. S. 655. Where the statute is

general in terms and fails fully, directly, and expressly to set forth with certainty and without ambiguity all of the essential elements necessary to constitute offense, the indictment must descend to particulars and charge every constituent ingredient of which the crime is composed. *United States v. Cruikshank et al.*, 92 U. S. 542; *United States v. Hess*, 124 U. S. 483; *Evans v. United States*, *supra*; *Moore v. United States*, 160 U. S. 268; *Manley v. Georgia*, 279 U. S. 1.

The Sherman Act is couched in general language, it speaks in generic terms, and it fails to enter into details. It "has the degree of generality and adaptability comparable to that found to be desirable in constitutional provisions." *Appalachian Coals, Inc., v. United States*, 288 U. S. 344. It therefore is necessary that an indictment charging an offense under its provisions descend to particulars and allege the constituent ingredients of which the crime is composed. *United States v. Armour & Co.*, *supra*. But these indictments charge in the language of the Act that the defendants formed and entered into the combination and conspiracy; and, obedient to the necessity of doing so, they descend to particulars and undertake to charge the essential elements of which the offense is composed. In short; the agreement to restrict or monopolize interstate commerce, as the case may be, is alleged in conformity with the Act, and the plans of the conspirators are set out in detail.

An indictment must be considered as a whole in determining whether it charges all of the essential elements of the offense sufficiently to inform the accused of the nature of the accusation, to enable him to prepare his defense, and to enable him to plead the judgment and record of acquittal or conviction in bar to a later prosecution for the same offense. All pertinent parts of it must be brought into view and considered in their totality. *United States v. Armour & Co.*, *supra*.

In respect of time, the indictment in the case in Colorado charges in general terms that each of the allegations contained therein shall be deemed to refer to the period beginning on or about January, 1936, the exact date being unknown to the grand jurors, and continuing thereafter up to and including the date of the presentation of the indictment. And it contains a specific charge that beginning on or about January, 1936, the exact date being unknown to the grand jurors, and continuously thereafter up to and including the date of the presentation of the indictment, the defendants entered into and engaged in the combination and conspiracy. The indictments in the cases in Kansas, in each count, after describing the defendants and the nature and extent of the business, charge that for many years prior to the return of the indictment, and continuously up to and including the day of the

presentation of the indictment, the defendants, and others to the grand jurors unknown, formed and carried out the combination and conspiracy. The gist of the offense under the Sherman Act is the agreement or confederation to restrain or monopolize interstate commerce, as the case may be. *Nash v. United States*, 229 U. S. 373; *United States v. Socony-Vacuum Oil Co.*, 310 U. S. 150, 252. It is not exclusively a thing or entity of the very instant the minds of the parties come to a complete understanding, and no more. The purpose of the agreement is an essential element, and in its very essence it may contemplate that the operation shall extend over a period of time. If so, while the agreement continues, and while the parties are engaged in the operation of the design, they continue to transgress the statute. *United States v. Kissel*, 218 U. S. 601; *United States v. New York Great Atlantic & Pacific Tea Co.*, 137 F. (2d) 459, certiorari denied, 320 U. S. 783. These indictments each charge a continuing conspiracy. One fixes the beginning by a specific date; the other two fix it as many years prior to the presentation of the indictment; and all charge that it continued down to and including the date of the presentation of the indictment. That was sufficient in respect of time. *United States v. Kissel*, *supra*; *United States v. American Medical Association*, 110 F. (2d) 703, certiorari denied, 308 U. S. 599, 310 U. S. 644.

In respect of the place at which the combination or conspiracy was formed, the indictment in the case in Colorado charges that it was entered into and carried out in part in the District of Colorado, and that during the period of the conspiracy and within three years next preceding the presentation of the indictment, the defendants performed within such district many of the acts and things set forth in the indictment; and in each case in Kansas, the indictment charges that the combination and conspiracy was entered into and carried out in part in the District of Kansas, and within the First Division thereof, that a named defendant (*Safeway Stores, Inc.*, a Nevada corporation, in one instance, and *The Kroger Grocery & Baking Company*, in the other) has retail food stores, offices, and agents, and transacts business there, and that during the period of the combination and conspiracy, and within three years next preceding the presentation of the indictment, the defendants performed within such district and division many of the acts set forth in the indictment. More often than otherwise, a combination or conspiracy of the kind charged in these indictments is not formed or entered into by formal contract or other writing. It sometimes is not entered into wholly and completely at one time or place. It may be, and frequently is, pieced together and effected by contracts, conferences, verbal understandings, and arrangements, had and entered into at different times and places.

The allegation that the conspiracy was entered into and carried out in part within the district in which the indictment was returned was sufficient in respect of place, as against an attack by motion or demurrer on the ground of complete infirmity of the indictment.

The indictment in the case in Colorado charges that the defendants conspired to raise, fix, and maintain the retail prices of alcoholic beverages shipped into the state, without specifying or describing the particular kind or kinds of beverages. It also charges that it was a part of the combination and conspiracy to persuade, induce, and compel producers and wholesalers to enter into fair trade contracts, without giving the names of such producers and wholesalers; and that the defendants employ paid executives and investigators to spy upon and harass retailers who fail or refuse to observe the retail prices, mark-ups, and margins of profit agreed upon, without naming the executives, investigators, or retailers. And it contains other charges comparable in point of generality. The indictment in each case in Kansas charges in the first count that the defendants conspired to restrain interstate trade and commerce in food and food products, and in the second count to monopolize such trade and commerce, without specifying or describing the kind or kinds of food and food products. They further charge that it was a part of the combination and conspiracy that the defendants acquire by merger and otherwise the business of independent retail grocers and local chains throughout the United States, without naming or giving the location of the grocers and chains; and that they select local areas throughout the United States in which they use their dominant advantage to injure and destroy competition of independent grocers, meat dealers, and small local food chains, without specifying the areas or naming the grocers, meat dealers, or food chains. And they contain other comparable charges not necessary to detail, with similar omissions. But these indictments each charge in general terms a conspiracy to restrain interstate trade and commerce, or to monopolize such trade and commerce, as the case may be, substantially in the language of the Act. And if the allegations in respect to the manner and means of effecting the object of the combination and conspiracy are not set forth in sufficient detail, the remedy is to apply for a bill of particulars. *Glasser v. United States*, 315 U. S. 60.

Little need be said concerning the sufficiency of the indictments in respect to changing venue. In cases of this kind, jurisdiction is in the court of the district where the conspiracy was formed, or where some act pursuant to it took place. As already pointed out, the indictment in the case in Colorado charges that the combination and conspiracy was entered into and carried out in part

within the district, and that the defendants performed there many of the acts and things set forth in the indictment. And the indictment in each case in Kansas contains like charges. These allegations—admitted by the demurrers—were enough to lay venue. *Hyde v. United States*, 225 U. S. 347; *Brown v. Elliott*, 225 U. S. 392; *United States v. Trenton Potteries*, 273 U. S. 392; *United States v. Socony-Vacuum Oil Co.*, *supra*; *United States v. New York Great Atlantic & Pacific Tea Co.*, *supra*.

An additional ground of demurrer sustained in the cases in Kansas was that each count in the indictment was duplicitous, in that it attempted to charge more than one offense. The several counts each charge only a single crime—the conspiracy. The conspiracy as laid includes several acts and means of making it effective, but the crime is the entering into the combination. That is the unit, however varied the means and procedure of effectuating it. The several acts and means of making the conspiracy effective are related acts which enter into the crime, but still the single crime is that of combining and conspiring together to restrain interstate trade and commerce, or to monopolize such trade and commerce. Duplicity in an indictment means the charging of two or more separate and distinct offenses in one count, not the charging of a single offense into which several related acts enter as ways and means of accomplishing the purpose. *Braverman v. United States*, 317 U. S. 49; *United States v. New York Great Atlantic & Pacific Tea Co.*, *supra*.

Two additional questions remain for consideration concerning the indictment in the case in Colorado which are not present in the cases in Kansas. They are whether the Sherman Act longer applies to interstate commerce in intoxicating liquor, and whether the indictment charges a combination and conspiracy to restrict interstate trade and commerce or merely affects intrastate activities. The Twenty-first Amendment does not strip the national government of all authority to legislate in respect of interstate commerce in intoxicating liquor. *Hayes v. United States*, 112 F. (2d) 417; *Washington Brewers Institute v. United States*, 137 F. (2d) 964. But it does sanction the right of a state to legislate concerning the importation of such liquor from other states unfettered by the Commerce Clause. *Ziffrin, Inc. v. Reeves*, 308 U. S. 132; *Cf. Carter v. Virginia*, 321 U. S. 131. Aside from the diminution pro tanto which may be found in the Twenty-first Amendment in respect of the transportation of intoxicating liquor, a question unnecessary to determine here, Congress has plenary power under the Commerce Clause to regulate commerce among the states. And that power is not confined in all cases to the regulation of interstate commerce. It extends in sweep to intrastate activities which affect interstate trade, or the exercise of the power of Congress over

it, in such manner as to make the regulation of such intrastate activities unnecessary and appropriate for the protection of the free flow of interstate commerce. *United States v. Darby*, 312 U. S. 100.

A combination or agreement for price maintenance or which operates directly on prices or price structures of commodities moving in interstate commerce constitutes an unreasonable restraint within the Sherman Act, without regard to whether the prices or price structures agreed upon are reasonable or otherwise, *United States v. Trenton Potteries, supra*; *Ethyl Gasoline Corp. v. United States*, 309 U. S. 436; *United States v. Socony-Vacuum Oil Co., supra*; *United States v. Masonite Corp.*, 316 U. S. 265; one not fixing prices but intended unreasonably to restrict or restrain interstate commerce, or which by its operation necessarily impedes the due course of such commerce, comes within the Act, *Coronado Coal Co. v. United Mine Workers*, 268 U. S. 295; one which contemplates restraint of interstate trade but to be effectuated by acts constituting intrastate activities is met with the condemnation of the Act, *Bedford Cut Stone Co. v. Journeymen Stone Cutters' Ass'n.*, 274 U. S. 37; *Local 167. International Brotherhood of Teamsters v. United States*, 291 U. S. 293; and primarily local likewise finds itself within the ambit of the Act if the means adopted to effectuate it operate to lay a direct and undue burden on interstate commerce. *Industrial Ass'n., v. United States*, 268 U. S. 64. But a combination or concert limited in its objectives to intrastate activities, with no intent or purpose to affect interstate commerce, is without the reach of the Act, even though there may be an indirect and insubstantial effect on interstate commerce. *United Mine Workers v. Coronado Coal Co.*, 259 U. S. 344; *United Leather Workers v. Herkert*, 265 U. S. 457; *Industrial Ass'n. v. United States, supra*; *Llëvering & Garrigues Co. v. Morrin*, 289 U. S. 103.

Colorado has a Fair Trade Act, chapter 146, Laws of 1937; an Unfair Practices Act, chapter 261, Laws of 1937; and a Liquor Code, sections 15-47, chapter 89, Colorado Statutes Annotated 1935. Under section 1 of the Fair Trade Act a contract relating to the sale or resale of a commodity bearing the trade-mark, brand, or name of the producer or distributor, and which commodity is in free and open competition, shall not be deemed in violation of any law of the state by reason of providing that the buyer will not resell such commodity at less than the minimum price stipulated by the seller or that the buyer will require of any dealer to whom he may resell such commodity an agreement that he will not resell at less than the minimum prices stipulated by the seller. Section 3 of the Unfair Practices Act provides that it shall be unlawful for anyone engaged in business in the state to sell, offer for sale, or adver-



tise for sale, any article or product for less than the cost thereof to the vendor, or give, offer to give, or advertise the intent to give away any article or product for the purpose of injuring competitors and destroying competition. Section 17 of the Liquor Code, as amended by chapter 160, Laws of 1941, makes it unlawful willfully and knowingly to advertise, offer for sale, or sell vinous liquors, spirituous liquors and alcoholic beverages at less than the price stipulated in any contract entered into pursuant to the provisions of the Fair Trade Act; section 29 provides for a manufacturers' license, a wholesaler's license, and a retail liquor store license; and section 20 authorizes the licensing authority, created by the preceding section, to make rules and regulations pursuant to the licensing provisions. Regulation 1 (3) promulgated under the Liquor Code provides that all spirituous liquor sold or transferred within the state must be affixed with the proper stamps before sale or transfer, and that wholesalers shall affix the proper stamps upon all liquor sold by them within the state to retailers or consumers prior to delivery; and regulation 12 C provides that all alcoholic liquor shall be the sole and exclusive property of and subject to the unrestricted power of disposal of a duly licensed Colorado wholesale dealer, as defined in the Liquor Code, at the time such liquor crosses the state line coming into the state for the purpose of being sold, offered for sale, or used there. These statutes and regulations are emphasized as constituting legal warrant for the fair trade agreements referred to in the indictment. And, justifying his appearance in the case by reference to the observation of the court in *Washington Brewers Institute v. United States*, *supra*, that the failure of any state to appear as a friend of the court to protest the enforcement of the Sherman Act, was significant, the attorney general of Colorado filed in this cause a brief as amicus curiae, calling attention to these statutes and regulations and contending that the fair trade contracts described in the indictment were entered into under the Fair Trade Act and the Liquor Code, that they are removed from the regulation and control of the United States, and that they are subject exclusively to the control and operation of the law of Colorado.

The agreement as pleaded in the indictment in this case was essentially one to fix and maintain prices at which alcoholic beverages shall be sold at retail in Colorado. Under regulation 12 C, *supra*, it is impossible for a retailer in that state to buy liquor from a producer. He can purchase it only from a wholesaler licensed under the laws of the state. Before liquor produced in other states can be acquired from the wholesaler title vests in the wholesaler at the time it crosses the state line coming into the state, and the required stamps must be affixed by the wholesaler. When



it comes to rest in the ownership and custody of the wholesaler, is placed in the warehouse of the wholesaler for local disposition to the retailer, and is commingled with other merchandise, it ceases to be an integral part of interstate commerce. *Industrial Ass'n. v. United States*, *supra*; *Walling v. Jacksonville Paper Co.*, 317 U. S. 564; *Higgins v. Carr Bros. Co.*, 317 U. S. 572; *Jewel Tea Co. v. Williams*, 118 F. (2d) 202; *Jax Beer Co. v. Redfern*, 124 F. (2d) 172; *Walling v. Goldblatt Bros.*, 128 F. (2d) 778; *Alessandro v. C. F. Smith Co.*, 136 F. (2d) 75. And sales subsequently made by the wholesaler to retailers and in turn by retailers to the consuming public are wholly intrastate transactions. *Jewel Tea Co. v. Williams*, *supra*.

The control of the handling, the sales, and the prices at the point of origin before movement in interstate commerce begins, or in the state where it ends, may in some circumstances directly and unduly burden interstate commerce. *Dr. Miles Medical Co. v. Park & Sons Co.*, 220 U. S. 373; *Local 167, International Brotherhood of Teamsters v. United States*, *supra*. But here it is not charged that the parties agreed and conspired to fix and maintain prices at which producers or others outside Colorado should sell their products to wholesalers within the state. Neither is it charged that it was a part of the agreement that producers should establish uniform prices from all producers and distillers to all wholesalers in Colorado of certain types, ages, or qualities of liquor moving in interstate commerce. No charge of that kind direct or by fair inferences is to be found in the indictment.

True, it is charged that it was part of the agreement that the retailers patronize only those producers and wholesalers who enter into fair trade contracts and withhold their patronage from those who fail to do so; that the retailers agree with the producers and wholesalers that retailers selling at prices lower than those established in the fair trade contracts be deprived of the opportunity to purchase from the defendant producers and wholesalers; and that the defendant retailers threaten to boycott and do boycott producers and wholesalers who supply their products to retailers failing or refusing to observe such retail prices, mark-ups, and margins of profits. But the words "patronize" and "patronage" as used clearly refer to the purchase of beverages from producers and wholesalers. And it is perfectly obvious that these allegations are completely innocuous and ineffective in charging an offense under the Sherman Act for the reason that retailers in Colorado cannot purchase from producers, and sales from wholesalers to retailers in that state are exclusively intrastate transactions.

The second count is completely barren of any allegations of fact effectively charging that the combination and agreement was one directly and substantially to restrict or burden the free and un-

trammelled flow of interstate commerce. The combination as pleaded was one necessarily intended to affect only intrastate activities. Its sole objective was control of domestic enterprise within the state, and it spent its direct and substantial force upon intrastate activities. Its effect, if any, on interstate commerce was indirect, insubstantial, and incidental. A combination of that kind lies beyond the reach of the Sherman Act.

The judgments in Numbers 2792 to 2799, inclusive, are severally reversed and the causes remanded with directions to dismiss the indictment as to these appellants; and the judgments in Numbers 2807 and 2808 are severally reversed and the causes remanded with directions to overrule the demurrers.

*PHILLIPS, Circuit Judge, dissenting:*

I dissent from that part of the opinion which upholds the sufficiency of the indictments in Numbers 2807 and 2808.

It is not sufficient to charge a conspiracy in general terms. The unlawful agreement and the unlawful purpose must be set forth with sufficient particularity to enable the defendant to ascertain from the charge itself what he is called upon to answer, to prepare his defense and get the witnesses to meet the charge and, if necessary, to plead the judgment on such charge as a bar to a second prosecution for the same offense. "A crime is made up of acts and intent; and these must be set forth in the indictment, with reasonable particularity of time, place, and circumstances." Every element of the offense "must be accurately and clearly alleged." *United States v. Cruikshank*, 92 U. S. 542, 558.

In Number 2807 the indictment alleges that the defendants engaged in a conspiracy from on or about January 1, 1920, until January 20, 1943, a period slightly in excess of 23 years; that the defendants carried on their business through 2825 stores, in 1029 towns, in 20 states and in the District of Columbia; and that the conspiracy was carried out in part in the District of Kansas, and "in many states of the United States."

In Number 2808 the indictment alleges that the defendants engaged in a conspiracy from January 1, 1917, to January 20, 1943; a period slightly in excess of 26 years; that the defendants carried on their business through 3422 stores, in 19 states; and that the conspiracy was carried out in part in the District of Kansas, and "in many states of the United States."

At the oral argument, counsel for the government admitted it did not rely upon an express agreement or conspiracy, but upon acts and circumstances from which a conspiracy may be implied. In neither indictment is the time, place, and circumstances of the alleged long-continuing conspiracies set forth with particularity. It follows that the defendants in each case must be prepared to

defend their entire conduct with respect to the matters charged against them over a period of approximately a quarter of a century, and in a great number of cities and towns throughout a large number of the states of the United States. To prepare a defense to the charges laid would be most difficult if not impossible. It imposes an unnecessary burden which can and should be avoided. The sufficiency of an indictment should be determined by practical, not purely technical, considerations. The test should be, does it, under all the circumstances of the case, tell the defendant all that he needs to know to enable him to prepare his defense, and does it so specify that with which he is charged that he will not be in danger of being a second time put in jeopardy?

I agree that it is not necessary to plead, with particularity, the time, place, and circumstances of the manner and means of effecting the objects of the conspiracy. *Glasser v. United States*, 315 U. S. 60, 66. But it does seem to me that the time, place, and circumstance of the unlawful agreement should be pleaded with particularity. Paragraph 23 of the indictment in Number 2807 and Paragraph 20 of the indictment in Number 2808 do plead the terms of the alleged unlawful agreements. But neither alleges them with any particularity as to time, place, or circumstance, leaving the government free to prove acts and conduct from which it will ask the jury to infer the unlawful agreement, in Number 2807 limited only with respect to time to a period in excess of 23 years and with respect to place within 20 states of the Union and in the District of Columbia, and in Number 2808 limited only with respect to time to a period in excess of 26 years and with respect to place within 19 states of the Union. One of the terms of both the conspiracies as charged is that the defendants would select local areas wherein they would use their dominant advantage to injure and destroy the competition of independent grocers, meat dealers, and small local food stores. Another term of both of the conspiracies as charged is that the defendants would systematically prevent competition in selected trade areas. The government expects to prove facts and circumstances from which it will ask the jury to infer that the defendants so agreed and conspired. If the unlawful agreement was an implied one, arising out of acts and conduct on the part of the defendants, then the time and place of the unlawful agreement were coincident with the time and place of such acts and conduct, and that time and place should be alleged in the indictments.

I see no reason why the government should not allege, and, indeed, it seems to me it should be required to allege, in each indictment, with reasonable particularity the period within which it expects to prove the acts and conduct from which such term of the

*Hill v. United States*, 4 Cir., 42 F. 2d 812, 814; *Center v. United States*, 4 Cir., 96 F. 2d 127, 129; *Hewitt v. United States*, 8 Cir., 110 F. 2d 1, 6.

conspiracy may be implied, and with reasonable particularity the place or places at which such acts and conduct took place. The same is true with respect to the other terms of the conspiracy alleged in Paragraph 23 in Number 2807 and the terms of the conspiracy alleged in Paragraph 20 in Number 2808. If the exact time was unknown to the grand jurors, that fact could be alleged, but with reasonable approximation the government should be able to allege the period of time within which such acts and conduct occurred and the place or places where they occurred. I do not mean that the government should have alleged the acts and conduct, but rather that it should have alleged the time and place of such acts and conduct, as for example, "in continuation of, and as a part of the same combination and conspiracy, the defendants between the first day of December, 1926, and the first day of December, 1927, the exact date being to the grand jurors unknown, in the states of Ohio and California, the exact places being to the grand jurors unknown, conspired and agreed to select local areas wherein they would use their dominant advantage to injure and destroy the competition of independent grocers, meat dealers, and small local food stores." The times and places in the example, of course, are improvised. By so doing, the government would meet the requirements laid down in the Cruikshank case that the acts and the intent which make up the crime must be set forth in the indictment with reasonable particularity as to time, place, and circumstance.

There are practical reasons why the requirement of particularity should be strictly adhered to in a conspiracy charge. It is a well-known fact that the preparation of a defense to a conspiracy charge imposes a most difficult task and the government should not be permitted to increase that difficulty by resorting to general allegations in the indictment.

Both indictments charge a conspiracy "to restrain interstate trade and commerce in food and food products." In neither indictment is the phrase defined with particularity. The food and food products dealt in by the defendants embrace a vast number of items. It seems to me that the indictments should charge the general categories of food and food products, as for example, "fresh fruits and vegetables," "canned fruits and vegetables," "coffees, teas, and spices," so that the defendants will know the categories of food and food products with respect to which they are charged to have conspired to restrain interstate trade and commerce, and thus be able to prepare their defense.

For the foregoing reasons, and the reasons stated by Judge Vaught in his dissenting opinion filed to the first opinion, now withdrawn, in Numbers 2807 and 2808, it is my opinion that the demurrers to the indictments were properly sustained. A copy of such dissenting opinion is appended hereto.

# UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

Appeal from the District Court of the United States for the  
District of Kansas

Nos. 2807-2808—January Term, 1944

2807

UNITED STATES OF AMERICA, APPELLANT

*v.*

SAFeway STORES, INCORPORATED (MARYLAND); SUTTER PACKING  
COMPANY; ARIZONA GROCERY COMPANY; L. A. WARREN;  
LAWRENCE GILES; W. L. HARRISON; A. D. KIRKLAND; V. O.  
STOCKLAND; J. R. FRENCH; C. N. SANDERS; DWIGHT EDWARDS;  
RALPH PRINGLE; FRANK PRINGLE; M. L. LANGFORD; F. O. BURNS;  
AND R. L. BUCHANAN, APPELLEES

2808

UNITED STATES OF AMERICA, APPELLANT

*v.*

THE KROGER GROCERY & BAKING COMPANY, WESCO FOODS COMPANY,  
THE COLTER COMPANY, PAY'N TAKIT, INC., CHARLES M. ROBERT-  
SON, JOSEPH BAPPERT, FRANK L. REOCK, AND JOSEPH B. HALL,  
APPELLEES

[January 17, 1944]

Holmes Baldrige, Special Assistant to the Attorney General  
(Wendell Berge, Assistant Attorney General, George H. West,  
United States Attorney, Horace L. Flurry and Earl A. Jinkinson,  
Special Assistants to the Attorney General, were with him on the  
brief), for Appellant.

Henry N. Ess (Mitchell T. Neff and Louis R. Gates were with  
him on the brief) for Appellees Safeway Stores, Incorporated  
(Maryland), et al.

Robert S. Marx (Frank E. Wood; Thomas M. Lillard; Nichols,  
Wood, Marx & Ginter; and Lillard, Eidson, Lewis & Porter were  
with him on the brief), for Appellees The Kroger Grocery & Bak-  
ing Company, et al.

Before PHILLIPS and BRATTON, Circuit Judges, and VAUGHT,  
District Judge

VAUGHT, *District Judge*, dissenting:

This opinion pertains to Cause Number 2807 in its analysis but  
applies to Cause Number 2808 as to final results.

The indictment is in two counts. The first count charges an unlawful conspiracy to restrain interstate trade and commerce in the manufacture, distribution and sale of food products in many states of the United States in violation of Section 1 of the Sherman Act. The second count charges an unlawful combination and conspiracy to monopolize interstate trade and commerce in the manufacture and distribution of food and food products in many states of the United States in violation of Section 2 of the Sherman Act. Demurrers to the indictments were sustained and the plaintiff has appealed.

The indictment is long and complicated. The charging part of the first count is contained in paragraphs 22 to 27, and in the second count in paragraphs 28 to 33.

An indictment for conspiracy is probably the most difficult pleading a prosecutor is called upon to prepare. The very nature and character of the crime are such that it is conceived and executed under cover, and often can only be proved by piecing together the overt acts and the means employed by the defendants in devising and carrying out the scheme. There are two general classes of conspiracy. One, a conspiracy to commit a crime, and one, in which the conspiracy itself constitutes the crime. One of the most satisfactory definitions of conspiracy, so far as it pertains to the case at bar, is found in *Pettibone v. United States*, 148 U. S. 197, 203, where Mr. Chief Justice Fuller said:

"A conspiracy is sufficiently described as a combination of two or more persons, by concerted action, to accomplish a criminal or unlawful purpose, or some purpose not in itself criminal or unlawful, by criminal or unlawful means, and the rule is accepted, as laid down by Chief Justice Shaw in *Commonwealth v. Hunt*, 4 Met. 111, that when the criminality of a conspiracy consists in an unlawful agreement of two or more persons to compass or promote some criminal or illegal purpose, that purpose must be fully and clearly stated in the indictment; while if the criminality of the offence consists in the agreement to accomplish a purpose not in itself criminal or unlawful, by criminal or unlawful means, the means must be set out."

In *United States v. American Naval Stores Company et al.*, 172 F. 455, the court well said: "The gist of the offense is the unlawful agreement."

Thus, in the case at bar, the gist of the offense is the unlawful agreement.

The indictment brings the accused into court. From that document he must determine *what* specific acts he is charged with having committed; *where*, *when* and *how* he is charged with having done the act. Crime is made up of acts and intent. Prosecutors, sometimes, in their zeal and ambition to protect the public,



overlook the fact that it is their duty not only to prosecute the guilty, but to protect the innocent from the embarrassment and expense of defending a groundless accusation. In recognition of this tendency and in order to throw about the citizen proper safeguards against it, the Fifth and Sixth Amendments to the Constitution were adopted. They provide, so far as pertinent here, that:

"No person shall \* \* \* be deprived of life, liberty or property without due process of law \* \* \* nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; \* \* \*"

and

"In all criminal prosecutions the accused shall enjoy the right \* \* \* to be informed of the nature and cause of the accusation; \* \* \*"

When a grand jury returns an indictment, it is presumed to be in possession of all the facts that are necessary to constitute the offense. If it is not, the indictment should not have been returned. The prosecutor who draws the indictment is equally advised, and there is no occasion for vagueness, lack of clarity, or ambiguity in the language employed in framing the charge in the indictment. It should be sufficiently definite, clear and simple that a layman can easily comprehend it.

Our courts have always been zealous to safeguard the rights of the citizen in this regard, fully recognizing the gravity of the situation confronting one charged with a crime. His life, his property, his good name may all depend upon the facts pleaded in the indictment. The Constitution guarantees to the citizen the right to be informed of the nature and cause of the accusation, and one must be able to ascertain the facts from the charge filed against him. Rather early in our history the courts began to express their views on the subject in clear and concise language. Probably the whole subject has been no more clearly expressed than in that landmark decision, *United States v. Cruikshank et al.*, 92 U. S. 542, 557, when the court said:

"\* \* \* the accused has the constitutional right 'to be informed of the nature and cause of the accusation.' \* \* \* the indictment must set forth the offence 'with clearness and all necessary certainty, to apprise the accused of the crime with which he stands charged;' and \* \* \* 'every ingredient of which the offence is composed must be accurately and clearly alleged.' \* \* \* The object of the indictment is, first, to furnish the accused with such a description of the charge against him as will enable him to make his defence, and avail himself of his conviction or acquittal for protection against a further prosecution for the same cause; and, second, to inform the court of the facts alleged, so that it



may decide whether they are sufficient in law to support a conviction, if one should be had. For this, facts are to be stated, not conclusions of law alone. A crime is made up of acts and intent; and these must be set forth in the indictment, with reasonable particularity of time, place, and circumstances." [Italics supplied.]

Counsel have cited many authorities, but when they are read in the light of the facts involved in each particular case, the principle remains the same. It is quite simple. What, where, when, and how, are the questions to be answered in every criminal charge. The defendant must be able to secure the answers to those questions from reading the indictment. He is not required to guess at any of them.

What does the indictment say in this case? In the first paragraph of count one, which is adopted by reference in count two, it is charged that

"Each of the allegations hereinafter contained in this count shall be deemed to refer to the period of time beginning on or about January 1, 1920, the exact date being to the Grand Jurors unknown, and continuing thereafter up to and including the date of the presentation of this indictment, unless otherwise expressly stated."

The record discloses that the indictment was presented December 7, 1942. Thus, the defendants are apprised that the period of time covered is 22 years. From the memorandum opinion of the trial court (R. 49), we are informed the indictment contains 30 pages and is made up of 33 separately numbered paragraphs. Many of the paragraphs have several subdivisions. The charging part of the indictment is contained in paragraphs 22 to 27, charging restraint of trade, and paragraphs 28 to 33, charging monopoly. The other paragraphs are made up of definitions, and the nature, extent, organization and growth of the business of the defendants.

The indictment discloses that the defendant Safeway Stores, Incorporated, in 1941, had 2825 stores in 1029 towns in various parts of the United States. Paragraph 22 charges as follows:

"For many years prior to the return of this indictment, and continuously up to and including the day of the finding and presentation of this indictment, defendants, and other persons to the grand jurors unknown, well knowing all the facts alleged in this indictment, have wilfully and unlawfully formed and carried out, in part within the District of Kansas, First Division, a wrongful and unlawful combination and conspiracy to unduly, unreasonably and directly restrain interstate trade and commerce in food and food products, produced, distributed and sold in many states of

the United States, in violation of Section 1 of the Act of Congress of July 2, 1890, \* \* \* the Sherman Act."

Paragraph 23: "The aforesaid combination and conspiracy has consisted in a continuing agreement and concert of action among the defendants, the substantial terms of which have been:

"a. That the defendants acquire by merger and otherwise the business of independent retail grocers and local chains throughout the United States,

"b. That the defendants select local areas throughout the United States wherein they use their dominant advantage to injure and destroy the competition of independent grocers, meat dealers and small local food chains," (No place is named here.)

"(1) By selling at retail in those areas sufficiently lower than elsewhere, until control or the desired percentage of total retail business is obtained, using the income from other areas and from operations of the business other than retail, to offset the losses or reductions in profits incident to such price cutting." (No "areas" are named here and in vain would defendants ask where all of this was to be done.)

"(2) By combining with other national food chains, operating in such selected areas, to fix, maintain and follow the prices established by defendants." (What "selected areas" and where were they located?)

"c. That defendants systematically prevent competition in selected trade areas throughout the United States," (How are the defendants to know or ascertain from this charge, where such "selected trade areas" are located "throughout the United States"?)

"(1) By combining with the independent grocers and local and national food chains operating therein to fix the retail prices and terms upon which food would be sold in such areas," (What "independent grocers and local and national food chains" and where are they located, and what "food" would be sold in such areas?)

"(2) By combining with manufacturers of food and food products and others to fix and maintain the resale prices and policies in such selected areas and to aid and assist such manufacturers and others in enforcing the resale prices so fixed and established. \* \* \*." (What "manufacturers," and where are they located, and what "food and food products" are meant here? Who are the parties designated as "others"; where located; and what "policies" are to be maintained?)

Thus the indictment runs throughout its 30 pages. Under paragraph 23, subdivision d, are listed eight charges in which the word "suppliers" is used, but nowhere in the definitions in the indictment is this term defined. The defendants can only guess with whom they are charged with dealing here, and can only guess where they are located. Subdivision e mentions "competitors"

without naming them in any instance or locating them, again leaving the defendants to guess, who is meant or where they were located, except that they were somewhere within the broad confines of the United States. Subdivision (2) of subdivision e of paragraph 23 reads:

"By organizing, financing and preparing publicity and propaganda for false front farmer, consumer and housewife organizations, civic clubs and other organizations, and using the statements of such organizations in support of such false comparisons and reports as to prices, values and services offered by defendants and their competitors."

What is meant here by "false front farmer, consumer and housewife organizations?" What "civic clubs" and "other organizations?" They are not named and their location is undisclosed. Subdivision e (3) reads:

"By the systematic practice of secretly enhancing their actual prices above their advertised prices through short-changing, short-weighting and marking up prices on store tags and purchases."

In which of the 2825 stores did these things occur? How can the defendants know from reading the charge? Or was it meant to charge that they occurred in each store every day for 22 years? Paragraph 24 might so indicate and the defendants could not be certain until the trial. It reads:

"During the period of time covered by this indictment, and for the purpose of forming and effectuating the aforesaid combination and conspiracy, the defendants, by agreement and concert of action, have done the things which, as hereinbefore alleged, they conspired to do."

As the defendants read this indictment and attempt to comprehend it for the purpose of preparing a defense to the charges, which leave so much to speculation, in what situation are they placed? They have 2825 stores located throughout the United States, doing business every day, making millions of sales each year. If just one act a day in each store was contemplated by the charge, it would mean 1,031,125 acts to be checked in order to be safe in the preparation for trial. An indictment charging one with a crime must be more definite than that. A defendant has a right to be specifically charged.

It is agreed that the conspiracy is the crime here, and that overt acts need not be charged, but the vice of the indictment is that in seeking to charge elements of the agreement, the charge becomes vague, ambiguous and so utterly confusing that neither the defendants nor the court can comprehend it. The defendants could be prosecuted many, many times on the same charge, and could not successfully plead a former conviction or acquittal under such a charge.

Paragraph 25 seeks to designate the effect of the conspiracy, and practically every sentence therein is a conclusion of the pleader.

Paragraph 26 has to do with the "jurisdiction and venue" and presents a rather novel situation. It reads:

"The combination and conspiracy herein alleged has been entered into and carried out in part within the District of Kansas and within the First Division thereof, where the defendant Safeway Stores, Inc., a Nevada corporation, has retail food stores, offices, and agents, and transacts business. During the period of said combination and conspiracy and within three years next preceding the presentation of this indictment, the defendants have performed within the District of Kansas and within the First Division thereof many of the acts set forth in Paragraph 23 hereof. Particularly, the said defendants have continuously since September 1, 1939, and down to the present time, advertised food and food products in Kansas City, Kansas, and elsewhere in the state of Kansas, below cost and below the price charged by them for similar products in other locations, for the purpose and with the intent of injuring and destroying competition of independent concerns and local chain stores."

Here, for the first time, we find a date that apprises the defendants of the time some specific act, which is claimed to be unlawful, is charged to have occurred. It is charged that the combination and conspiracy alleged has been "entered into and carried out in part within the District of Kansas." It will be observed that the indictment alleges, in the beginning of the charge, that the conspiracy was formed 22 years ago. Is it intended, now, to be charged that it was so formed in part in Kansas 22 years ago, or is it intended to charge that it was entered into in part in the state of Kansas in the past three years? Again, the defendants must guess or speculate. But particularizing, it is charged that within three years next preceding the indictment, the defendants have performed many of the acts set forth in paragraph 23 within the state of Kansas. What, specifically? The defendants have a right to be informed.

Then further particularizing, it is charged that the defendants have continuously since September 1, 1939, down to the date of the presentment of the indictment "advertised food and food products" in Kansas City, Kansas, "and elsewhere in the state of Kansas," below cost and "below the price charged by them" for "similar products" in "other locations" for the purpose and intent of injuring and destroying "competition" of "independent concerns" and "local chain stores."

What is intended by the phrase, "food and food products," in this connection? How can the defendants know what is meant

to be charged? "Food and food products" cover a wide field. The defendants must defend against this charge. They are continuously dealing in perishable "food and food products"; they must be continually on the alert to maintain their stocks of food and food products in a merchantable condition. This of necessity, when dealing with perishable goods, calls for prompt action in each store, regardless of what the condition may be in other like stores, there, or in other localities.

It is charged that the advertisement was in **Kansas City, Kansas**, and "elsewhere in the state of **Kansas**." Where? It is charged that the advertisements were "for the purpose and with the intent" of injuring and destroying "competition of independent concerns and local chain stores." Naturally, the defendants again inquire, what "independent concerns" and what "local chain stores" and where?

Count number two charges "combination and conspiracy to monopolize" in the same language as count number one.

An indictment for conspiracy to restrain interstate trade and commerce is governed by the same rules of law as any other offense. It is not enough to allege the crime in the words of the statute. To charge one with "murder," "burglary," or any other crime, the elements of the offense must appear, as hereinbefore designated. If any of these elements in such cases is absent in the charge, then the charge is defective.

It is true that in a conspiracy charge such as we have in the case at bar, the agreement itself is the crime, but one has the right to know and be informed by indictment which charges it, where and when the agreement was formed and what its elements were.

This court has consistently held that the place of an alleged offense must be charged with particularity. In *Skelley v. United States*, 37 F. 2d 503, it held:

"Indictment charging that defendant at Oklahoma City wilfully, unlawfully, and fraudulently received, concealed, bought, and facilitated transportation and concealment after importation of smoking opium, under 21 USCA sec. 174, held insufficient for failure to designate specifically the place where the offense was committed; nature and cause of accusation not being sufficiently stated to comply with Const. Amends. 5, 6."

In holding the demurrer to the indictment should have been sustained, the court said:

"\* \* \* Oklahoma City has a population of about 150,000, and of course, there are innumerable places therein where the crime charged might have been committed. The police officers who made the arrest and discovered the drug in the possession of appellant gave the name of the street and the street number in

their testimony, where the drug was found; but for some inexplainable reason the pleader did not put the location in the indictment. Nor did he otherwise 'earmark' the charge as Judge Booth aptly terms it in *Myers v. United States* (C. C. A.) 15 F. (2d) 987 et seq., so as to separate and make certain from the general charge therein contained the particular offense of which appellant was accused and was to be put on trial."

In *White v. United States*, 10 Cir., 67 F. 2d 71, the court followed the reasoning in the *Skelley* Case, supra, and after a careful analysis of the leading federal cases dealing with indictments charging a conspiracy, the court concluded:

"In dealing with laws which are intended equally for the protection of the innocent as well as the punishment of the guilty, too much latitude should not be indulged solely for the purpose of arriving at a desired result in an individual case. The looseness in criminal pleading brought to light in this case should not receive encouragement through judicial sanction."

The majority opinion in the case at bar states that we must depart from the holding in the *Skelley* and *White* cases for the reason that they are out of harmony with *Glasser v. United States*, 315 U. S. 60.

An analysis of the *Glasser* Case leads to a different conclusion. The particular count of the indictment which was under consideration, after alleging that during certain periods, Glasser and Kretske were assistant United States attorneys for the Northern District of Illinois, employed to prosecute all delinquents for crimes and offenses cognizable under the authority of the United States, and more particularly, violations of the federal internal revenue laws relating to liquor, charged in substance that the defendants conspired to "defraud the United States of and concerning its governmental function to be honestly, faithfully and dutifully represented in the courts of the United States" in such matters "free from corruption, improper influence, dishonesty, or fraud." The means were then set out in detail. The indictment contained every ingredient of the conspiracy. It charged a conspiracy was entered into by the defendants within the jurisdiction of the court, and with sufficient clarity, how, when, and where the conspiracy was formed. It left nothing for speculation or guess so far as these elements were concerned. Certain matters, as to details, might be called for, or requested by, a bill of particulars, but the indictment must always be definite and clear as to the ingredients of the offense. If these are not set out with sufficient clarity to inform the defendant what he is required to meet, it is a defective indictment. If the ingredients of the offense are not contained within the four corners of that document, nothing that might be supplied by the prosecutor by way of a bill of particulars can suffice. It



was not even contended in the *Glasser Case* that the indictment was not specific as to the elements constituting the conspiracy. The court said:

"\* \* \* The particularity of time, place, circumstances, causes, etc., in stating the manner and means of effecting the *object of a conspiracy*, for which petitioners contend, is not essential to an indictment." [Italics supplied.]

It will be noted that this conclusion is not with respect to the elements of the conspiracy itself, but to the means of *effecting the object* of the conspiracy. The indictment contains all of the necessary elements of the conspiracy. That which the court says is not essential to be alleged in the indictment has reference to the overt acts.

In the case at bar, we are not dealing with overt acts. They are not necessary elements in the charge of conspiracy. Where allegations in the indictment are not definite in stating the alleged conspirators, the place, time and manner in which the unlawful agreement was reached, which constituted the conspiracy, the indictment is so defective that it cannot be cured by a bill of particulars.

I feel that this court in the *Skelley* and *White* cases properly stated the law and that these cases are not affected by the *Glasser Case*, since in that case the Supreme Court, after in effect holding that the indictment alleged every necessary element of the conspiracy, and alleged an overt act in carrying the conspiracy into effect, said the "particularity of time, place, circumstances, causes, etc., in stating the manner and means of effecting the object of a conspiracy, for which petitioners contend, is not essential to an indictment."

An examination of *Crawford v. United States*, 212 U. S. 183, and *Dealy v. United States*, 152 U. S. 539, on which the Supreme Court bases the above conclusion in the *Glasser Case*, discloses that in the *Crawford Case* the defendant and others were indicted for a conspiracy to defraud the United States by means stated in the indictment, and in relation to a contract between the Postal Device and Lock Company and the Post Office Department of the United States by which that company was to furnish certain satchels to the department for the use of the letter carriers in the free delivery system of the government. The indictment set out a number of acts of the defendants with minute particularity in the furtherance of the conspiracy and charged that on June 3, 1902 the defendant and Machen and one Lorenz, intending to defraud the United States, unlawfully and fraudulently conspired, "knowingly, wrongfully and corruptly to defraud the United States in a dishonest manner, and through and by means of a dishonest scheme and arrangement." Then follows the full terms of the

agreement. The indictment informs the defendant exactly what he is charged with having done, and when, where and how he was to consummate the conspiracy. It leaves nothing to speculation or guess and he knows with what he is called upon to defend.

In *Dealy v. United States*, *supra*, in an opinion by Mr. Justice Brewer, the court said:

"The gist of the offense is the conspiracy. As said by Mr. Justice Woods, speaking for this court, in *United States v. Britton*, 108 U. S. 199, 204: 'This offence does not consist of both the conspiracy and the acts done to effect the object of the conspiracy, but of the conspiracy alone. The provision of the statute, that there must be an act done to effect the object of the conspiracy, merely affords a locus penitentiae, so that before the act done either one or all of the parties may abandon their design, and thus avoid the penalty prescribed by the statute.' Hence, if the conspiracy was entered into within the limits of the United States and the jurisdiction of the court, the crime was then complete, and the subsequent overt act in pursuance thereof may have been done anywhere."

The construction placed by the majority opinion upon the *Glasser* Case, which is based upon the *Crawford* and the *Dealy* cases, in my judgment, is not consistent either with the *Glasser* Case or the cases upon which it is based.

It is with great reluctance that I dissent from the majority opinion of my distinguished friends on this court, but I have such a firm conviction that an indictment cannot be stated in legal conclusions and in terms so general and indefinite as those contained in this indictment, that I must conclude that the judgment of the lower court should be affirmed.

#### Judgment, Case No. 2792, Aug. 26, 1944

Forty-ninth Day, May Term, Saturday, August 26th, A. D. 1944. Before Honorable Orie L. Phillips, Honorable Sam G. Bratton, Honorable Walter A. Huxman, and Honorable Alfred P. Murrah, Circuit Judges.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the District of Colorado and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this court that the judgment and sentence of the said district court in this cause be and the same is hereby reversed; and that this cause be and the same is hereby remanded to the said district court with directions to dismiss the indictment as to appellant.

**Judgment, Case No. 2793, Aug. 26, 1944**

Forty-ninth Day, May Term, Saturday, August 26th, A. D. 1944. Before Honorable Orie L. Phillips, Honorable Sam G. Bratton, Honorable Walter A. Huxman, and Honorable Alfred P. Murrah, Circuit Judges.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the District of Colorado and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this court that the judgment and sentence of the said district court in this cause be and the same is hereby reversed; and that this cause be and the same is hereby remanded to the said district court with directions to dismiss the indictment as to appellant.

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**Judgment, Case No. 2794, Aug. 26, 1944**

Forty-ninth Day, May Term, Saturday, August 26th, A. D. 1944. Before Honorable Orie L. Phillips, Honorable Sam G. Bratton, Honorable Walter A. Huxman, and Honorable Alfred P. Murrah, Circuit Judges.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the District of Colorado and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this court that the judgment and sentence of the said district court in this cause be and the same is hereby reversed; and that this cause be and the same is hereby remanded to the said district court with directions to dismiss the indictment as to appellant.

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**Judgment, Case No. 2795, Aug. 26, 1944**

Forty-ninth Day, May Term, Saturday, August 26th, A. D. 1944. Before Honorable Orie L. Phillips, Honorable Sam G. Bratton, Honorable Walter A. Huxman, and Honorable Alfred P. Murrah, Circuit Judges.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the District of Colorado and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this court that the judgment and sentence of the said district court in this cause be and the same is hereby reversed; and that this cause be and the same is hereby remanded to the said district court with directions to dismiss the indictment as to appellant.

**Judgment, Case No. 2796, Aug. 26, 1944**

Forty-ninth Day, May Term, Saturday, August 26th, A. D. 1944.  
Before Honorable Orie L. Phillips, Honorable Sam G. Bratton,  
Honorable Walter A. Huxman, and Honorable Alfred P. Murrah,  
Circuit Judges.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the District of Colorado and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this court that the judgment and sentence of the said district court in this cause be and the same is hereby reversed; and that this cause be and the same is hereby remanded to the said district court with directions to dismiss the indictment as to appellant.

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**Judgment, Case No. 2797, Aug. 26, 1944**

Forty-ninth Day, May Term, Saturday, August 26th, A. D. 1944.  
Before Honorable Orie L. Phillips, Honorable Sam G. Bratton,  
Honorable Walter A. Huxman, and Honorable Alfred P. Murrah,  
Circuit Judges.

This cause came on to be heard on the transcript of record from the District Court of the United States for the District of Colorado and was argued by counsel.

On considerations whereof, it is now here ordered and adjudged by this court that the judgment and sentence of the said district court in this cause be and the same is hereby reversed; and that this cause be and the same is hereby remanded to the said district court with directions to dismiss the indictment as to appellant.

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**Judgment, Case No. 2798, Aug. 26, 1944**

Forty-ninth Day, May Term, Saturday, August 26th, A. D. 1944.  
Before Honorable Orie L. Phillips, Honorable Sam G. Bratton,  
Honorable Walter A. Huxman, and Honorable Alfred P. Murrah,  
Circuit Judges.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the District of Colorado and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this court that the judgment and sentence of the said district court in this cause be and the same is hereby reversed; and that this cause be and the same is hereby remanded to the said district court with directions to dismiss the indictment as to appellant.

**Judgment, Case No. 2799, Aug. 26, 1944**

Forty-ninth Day, May Term, Saturday, August 26th, A. D. 1944. Before Honorable Orie L. Phillips, Honorable Sam G. Bratton, Honorable Walter A. Huxman, and Honorable Alfred P. Murrah, Circuit Judges.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the District of Colorado and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this court that the judgment and sentence of the said district court in this cause be and the same is hereby reversed; and that this cause be and the same is hereby remanded to the said district court with directions to dismiss the indictment as to appellant.

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**Order Withdrawing Opinion of February 28, 1944**

Fifty-second Day, May Term, September 2nd, A. D. 1944. Before Honorable Orie L. Phillips, Honorable Sam G. Bratton, Honorable Walter A. Huxman, and Honorable Alfred P. Murrah, Circuit Judges.

It is now here ordered by the court that the opinion filed in these causes on February 28, 1944, be and the same is hereby withdrawn.

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**Order Staying Mandates**

First Day, September Term, Tuesday, September 5th, A. D. 1944. Before Honorable Orie L. Phillips, Honorable Sam G. Bratton and Honorable Walter A. Huxman, Circuit Judges.

These causes came on to be heard on the motion of appellee for a stay of the mandates herein and were submitted to the court.

On consideration whereof, it is now here ordered by the court that said motion be and the same is hereby granted and that no mandate of this court issue herein for a period of thirty days from this day, and that, if within said period of thirty days there is filed with the clerk of this court a certificate of the clerk of the Supreme Court of the United States that a petition for writ of certiorari, record and brief have been filed, with proof of service thereof under section 3 of rule 38 of the Supreme Court, the stay hereby granted shall continue until the final disposition of the cases by the Supreme Court.

## Clerk's Certificate

## United States Circuit Court of Appeals, Tenth Circuit

I, Robert B. Cartwright, Clerk of the United States Circuit Court of Appeals for the Tenth Circuit, do hereby certify the foregoing as a full, true, and complete copy of the transcript of the record from the District Court of the United States for the District of Colorado, and full, true, and complete copies of certain pleadings, record entries and proceedings, including the opinion (except full captions, titles and endorsements omitted in pursuance of the rules of the Supreme Court of the United States) had and filed in the United States Circuit Court of Appeals for the Tenth Circuit in certain causes in said United States Circuit Court of Appeals, Nos. 2792 to 2799, inclusive, wherein Frankfort Distilleries, Inc., et al. were appellants, and United States of America was appellee, as full, true, and complete as the originals of the same remain on file and of record in my office.

In testimony whereof, I hereunto subscribe my name and affix the seal of the United States Circuit Court of Appeals for the Tenth Circuit, at my office in Denver, Colorado, this 12th day of September, A. D. 1944.

[SEAL]

ROBERT B. CARTWRIGHT,

*Clerk of the United States Circuit,  
Court of Appeals, Tenth Circuit,*

By GEORGE A. PEASE,  
*Chief Deputy Clerk.*



137 Supreme Court of the United States

No. 523, October Term, 1944

*Order allowing certiorari*

Filed November 13, 1944

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Tenth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

138 Supreme Court of the United States

No. 524, October Term, 1944

*Order allowing certiorari*

Filed November 13, 1944

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Tenth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

139 Supreme Court of the United States

No. 525, October Term, 1944

*Order allowing certiorari*

Filed November 13, 1944

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Tenth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

140 Supreme Court of the United States

No. 526, October Term, 1944

*Order allowing certiorari*

Filed November 13, 1944

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Tenth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

141 Supreme Court of the United States

No. 527, October Term, 1944

*Order allowing certiorari*

Filed November 13, 1944

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Tenth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

142 Supreme Court of the United States

No. 528, October Term, 1944

*Order allowing certiorari*

Filed November 13, 1944

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Tenth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

143 Supreme Court of the United States

No. 529, October Term, 1944

*Order allowing certiorari*

Filed November 13, 1944

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Tenth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

144 Supreme Court of the United States

No. 530, October Term, 1944

*Order allowing certiorari*

Filed November 13, 1944

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Tenth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.



No. 523-530

**United States Circuit of the Ninth Circuit**

October Term, 1944

**UNITED STATES OF AMERICA, PETITIONER**

**FRANKSON DISTILLERS, INC.; NATIONAL DISTILLERS  
ASSOCIATION; BROWN FORDMAN  
DISTILLERS CORPORATION; BURMAN WALKER, INC.  
INDUSTRIAL DISTILLERS CORPORATION;  
SHAW-WALKER DISTILLERS CORPORATION; MCKINNON &  
BROWN, INCORPORATED; J. E. SHIELDS**

**PETITION FOR A WRIT OF HABEAS CORPUS TO THE UNITED  
STATES CIRCUIT COURT OF APPEALS FOR THE TENTH  
CIRCUIT**





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# In the Supreme Court of the United States

OCTOBER TERM, 1944

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No.

UNITED STATES OF AMERICA, PETITIONER

v.

FRANKFORT DISTILLERIES, INC.; NATIONAL DISTILLERS PRODUCTS CORPORATION; BROWN FORMAN DISTILLERS CORPORATION; HIRAM WALKER, INCORPORATED; SCHENLEY DISTILLERS CORPORATION; SEAGRAM-DISTILLERS CORPORATION; MCKESSON & ROBBINS, INCORPORATED; J. E. SPEEGLE

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## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

The Solicitor General prays that a writ of certiorari be issued to review judgments of the Circuit Court of Appeals for the Tenth Circuit which reversed judgments against respondents entered by the District Court for the District of Colorado after respondents had pleaded nolo contendere.

### OPINION BELOW

The opinion of the Circuit Court of Appeals (R. 105) is not yet reported. The opinion of the District Court is reported in 47 F. Supp. 160.

**JURISDICTION**

The judgments of the Circuit Court of Appeals were entered on August 26, 1944 (R. 132-135). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925, and as modified by Rule 11 of the Criminal Appeals Rules.

**QUESTIONS PRESENTED**

1. Whether a conspiracy by retailers within a State not to purchase the product of certain producers engaged in shipping their goods into the State from other States restrains interstate commerce and violates the Sherman Act if the retailers do not purchase directly from the producers but from the producers' vendees.

2. Whether a conspiracy to subject a commodity moving in interstate commerce to agreements to maintain the resale price on intrastate sales of the commodity restrains interstate commerce and violates the Sherman Act.

3. Whether a conspiracy on the part of producers, wholesalers, and retailers to blanket by price-fixing agreements the entire wholesale and retail trade in a commodity within a State restrains the trade of those shipping the commodity into the State from other States and violates the Sherman Act.

**STATUTE INVOLVED**

Section 1 of the Act of July 2, 1890, 26 Stat. 209, known as the Sherman Act, as amended by

the Act of August 17, 1937, 50 Stat. 693, 15 U. S. C. 1, provides in part as follows:

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal: *Provided*, That nothing herein contained shall render illegal, contracts or agreements prescribing minimum prices for the resale of a commodity which bears, or the label or container of which bears, the trade mark, brand, or name of the producer or distributor of such commodity and which is in free and open competition with commodities of the same general class produced or distributed by others, when contracts or agreements of that description are lawful as applied to intrastate transactions, under any statute, law, or public policy now or hereafter in effect in any State, Territory, or the District of Columbia in which such resale is to be made, or to which the commodity is to be transported for such resale, \* \* \* : *Provided further*, That the preceding proviso shall not make lawful any contract or agreement, providing for the establishment or maintenance of minimum resale prices on any commodity herein involved, between manufacturers, or between producers, or between wholesalers, or between brokers, or between factors, or between retailers, or between persons, firms, or corporations in competition with each

other. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a misdemeanor, \* \* \*.

#### STATEMENT

An indictment in two counts was returned against respondents and certain other defendants charging them with violating Section 1 of the Sherman Act. After the district court had overruled demurrers to the indictment and motions to quash, the Government was required to elect between the two counts and elected to stand on the second, and the first count was thereupon quashed (R. 53-54). Respondents pleaded *nolo contendere* to the second count and judgments imposing fines were entered (R. 56-63). On appeal by the respondents,<sup>1</sup> the Circuit Court of Appeals reversed the judgments against them upon the ground that the indictment failed to show that the conspiracy charged in the second count was in restraint of interstate commerce.<sup>2</sup>

<sup>1</sup> Six of the respondents are out-of-state producers (R. 4), one is a wholesaler doing business in Colorado (R. 5), and one is a retailer doing business in Colorado (R. 6, 11).

<sup>2</sup> After the court had filed an opinion on respondents' appeals it set the appeals, together with the appeals in two other cases involving the validity of indictments returned under the Sherman Act (*United States v. Safeway Stores, Inc.*, and *United States v. Kroger Grocery & Baking Co.*), for rehearing before the full bench of the Tenth Circuit (R. 104-105). The opinion on rehearing, which covers all of these appeals, was substituted for the opinions previously announced by the court in these cases (*ibid.*).



The defendants named in the indictment are various producers of alcoholic beverages who ship their product into Colorado from points outside the State, various wholesalers and retailers of such beverages doing business in Colorado, an association of such wholesalers and an association of such retailers, and certain officers or employees of the foregoing defendants (R. 3-13, 19). The indictment alleges that alcoholic beverages are marketed in Colorado by means of a continuous flow of shipments from producers outside the State, through wholesalers and retailers, to consumers in the State (R. 13, 19); that over 98% of the spirituous liquor<sup>3</sup> and over 80% of all wines consumed in Colorado are produced outside the State (R. 14, 19); and that the defendant wholesalers and defendant retailers handle most of the respective wholesale and retail sales of alcoholic beverages in Colorado (R. 14, 19).

The conspiracy charged against the defendants is set forth in paragraphs 30 and 31 of the indictment (R. 19-21). Paragraph 30 makes the general charge that the defendants have been engaged since January 1936 in a conspiracy to raise, fix, and maintain the retail prices of alcoholic beverages shipped into Colorado from producers located outside the State by raising and fixing retail mark-ups and margins of profit on such beverages and that this conspiracy is in restraint of inter-

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<sup>3</sup> Spirituous liquor is defined to mean any beverage containing 24% or more of alcohol, by volume (R. 2).

state commerce in these beverages. Paragraph 31 alleges that it has been a part of this conspiracy that—

(a) The defendants agree upon and adopt high and noncompetitive retail prices, mark-ups, and margins of profit.

(b) The defendant retailers and wholesalers agree upon a program to induce and compel producers to enter into "fair trade" contracts (affecting every type and brand of alcoholic beverage shipped into Colorado) and to establish in and by these contracts the retail prices, mark-ups, and margins of profit upon which the defendants have agreed.

(c) The defendant retailers prepare and adopt forms of fair trade contracts acceptable to themselves and agree with producers and wholesalers upon the forms of such contracts to be used by the latter.

(d) The defendant retailers circulate among themselves bulletins listing the names of producers and wholesalers who enter into fair trade contracts and the names of those who do not; agree to patronize only those producers and wholesalers who make such contracts and who compel observance of the minimum retail prices established therein; and agree to withhold their patronage from producers and wholesalers who fail or refuse to enter into fair trade contracts embodying the agreed retail prices, mark-ups, and margins of profit.

(e) In connection with revisions in the retail prices established by said fair trade contracts, the defendant retailers agree with defendant wholesalers and producers as to such revisions as will maintain the agreed retail mark-ups and margins of profit.

(f) The defendant retailers boycott wholesalers and producers who supply their products to retailers who do not observe the retail prices, mark-ups and margins of profit established by the fair trade contracts upon which the defendants have agreed.

The indictment alleges that one effect of the conspiracy has been to restrain and suppress interstate commerce in alcoholic beverages not covered by fair trade contracts (R. 23).

The grounds of the holding below that the indictment does not show any restraint of interstate commerce which the Sherman Act prohibits are not entirely clear. The decision appears to rest on two assumptions as to the application of the act. One is that a conspiracy to subject articles moving in interstate commerce to resale price maintenance agreements is not in restraint of interstate commerce if the sales on which prices are thus maintained are intrastate sales.<sup>4</sup> The other is that a conspiracy to boycott a producer, if

<sup>4</sup> The court seemed to think that all allegations of the indictment other than the charge of boycotting were disposed of by the fact that the indictment charged price-fixing only in retail sales and did not charge fixing the prices at which producers sold to wholesalers (R. 117, 118).

carried out by refusing to purchase his goods from his vendees, is not a conspiracy in restraint of the trade between the producer and his vendees.<sup>5</sup>

**SPECIFICATION OF ERRORS TO BE URGED**

The Circuit Court of Appeals erred:

(1) In holding count two of the indictment invalid.

(2) In holding that a conspiracy by retailers to boycott producers engaged in shipping their product in interstate commerce is not in restraint of this commerce if the retailers cannot legally purchase directly from the boycotted producers.

(3) In holding that a conspiracy to subject articles moving in interstate commerce to resale price maintenance contracts is not in restraint of interstate commerce if the sales on which prices are thus maintained are intrastate sales.

(4) In failing to hold that the indictment sets forth a conspiracy which, by eliminating price competition among wholesalers and retailers of alcoholic beverages in Colorado, restrains the trade of producers shipping such beverages to Colorado from other States.

(5) In reversing the judgments of the district court and dismissing the indictment as to respondents.

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<sup>5</sup> The court said that since the law of Colorado does not permit retailers in that State to purchase liquor from out-of-State producers (R. 117), the allegations of the indictment that retailers boycotted producers are "ineffective in charging an offense under the Sherman Act" (R. 118).

## REASONS FOR GRANTING THE WRIT

1. The indictment charges the defendant retailers with conspiring to boycott all producers shipping alcoholic beverages into Colorado who fail or refuse to enter into the fair trade contracts demanded by the retailers (R. 21-22). The holding of the court below that, because the retailers do not purchase directly from the producers, this allegation was insufficient to set forth a violation of the Sherman Act is, we submit, in conflict with numerous decisions of this Court.

In *Fashion Originators' Guild, Inc. v. Federal Trade Commission*, 312 U. S. 457, the Guild members, for the purpose of preventing the sale of garments copied from designs which Guild members had originated, agreed not to sell their own goods to retail stores which had purchased garments copied from their designs. This Court held the combination illegal under the Sherman Act although, just as in the present case, there were no direct dealings between the boycotting group and the producers against whom the boycott was directed. Similar agreements not to purchase, or not to work on a manufacturer's product after it is in the hands of his vendees, or not to deal with such vendees, have been held to violate the Sherman Act. *Loewe v. Lawlor*, 208 U. S. 274; *Duplex Printing Press Co. v. Deering*, 254 U. S. 443;

*Bedford Cut Stone Co. v. Journeymen Stone Cutters' Assn.*, 274 U. S. 37.<sup>6</sup>

It is immaterial that the indictment in the present case does not allege a purpose to destroy or injure the interstate trade of the boycotted producers. The direct and necessary effect of a boycott by retailers of producers who do not sell under fair trade contracts is to restrain or suppress the interstate trade of these producers since there is no market for their beverages in Colorado if the Colorado retailers refuse to buy them. Where restraint of interstate trade in a commodity is "the necessary and consequences" of the acts charged against the defendants in a Sherman Act indictment, no "allegation of a specific intent to restrain such trade" is necessary. *United States v. Patten*, 226 U. S. 525, 543.

2. The indictment unmistakably alleges a conspiracy to induce and compel the shipment of alcoholic beverages into Colorado under fair trade contracts establishing minimum retail prices, in other words, under resale price maintenance contracts.<sup>7</sup> Since the indictment charges that these

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<sup>6</sup> The fact that the above cases involved restraints by labor groups which today would probably fall within exemptions given by the Clayton Act, does not destroy the authority of the cases as interpretations of the application of the Sherman Act.

<sup>7</sup> Section 1 of the Colorado Fair Trade Act (1937 Session Laws, chap. 146) provides in part:

"No contract relating to the sale or resale of a commodity which bears \* \* \* the trade-mark, brand or name of

contracts were entered into pursuant to agreement among various retailers, as well as pursuant to agreement among various wholesalers, they are not within the exemptions from the Sherman Act given by the Miller-Tydings Act\* and the court below made no reference to that Act. We submit that the holding by the court below that the indictment fails to state an offense under the Sherman Act is in conflict with decisions by this Court, rendered in cases prior to the Miller-Tydings Act or in cases subsequent thereto but where the Act was not applicable, holding that agreements for the sale of goods in interstate commerce under contracts providing for resale price maintenance on subsequent intrastate sale of the goods are illegal under the Sherman Act.

In *United States v. Univis Lens Co.*, 316 U. S. 241, the defendants sold multifocal lenses both to wholesalers and to retailers. The contracts with both classes of distributors provided for resale

the producer \* \* \* shall be deemed in violation of any law of the State of Colorado by reason of the following provisions which may be contained in such contract :

"(a) That the buyer will not resell such commodity at less than the minimum price stipulated by the seller.

"(b) That the buyer will require of any dealer to whom he may resell such commodity an agreement that he will not, in turn, resell at less than the minimum price stipulated by the seller."

\* See the second proviso to the first sentence of Section 1 of the Sherman Act, as amended (*supra*, pp. 3-4). The Miller-Tydings Act amended Section 1 by adding the two provisos to the first sentence of that section.



price maintenance. As to retailers at least, the resale on which price was fixed was necessarily intrastate since the retailer was authorized to sell (see pp. 244, 245) only to consumers of the lenses. This Court, in holding that the contracts with retailers, as well as those with wholesalers, violated the Sherman Act, said (pp. 252-253):

Agreements for price maintenance of articles moving in interstate commerce are, without more, unreasonable restraints within the meaning of the Sherman Act \* \* \* and restrictions imposed by the seller upon resale prices of articles moving in interstate commerce were, until the enactment of the Miller-Tydings Act, 50 Stat. 693, consistently held to be violations of the Sherman Act.

*Dr. Miles Medical Co. v. Park & Sons Co.*, 220 U. S. 373, and *Ethyl Gasoline Corp. v. United States*, 309 U. S. 436, are similar holdings. In the latter case the defendants' jobber licensing system was held illegal under the Sherman Act because the contracts under which the Ethyl Corporation authorized refiners to use and sell its patented fluid provided for control by Ethyl of the prices and business practices of the jobbers to whom the refiners sold. The facts make it clear that most of the jobbers whose sales prices and practices

were thus controlled sold exclusively in intrastate commerce.<sup>9</sup>

3. The present indictment charges a conspiracy to blanket the wholesale and retail trade in Colorado by price-fixing agreements. Since the necessary effect of this conspiracy is to compel out-of-State producers to sell in a market in which price competition among purchasers is wholly or largely suppressed, the indictment sets forth a restraint which operates directly and substantially upon interstate commerce and violates the Sherman Act.<sup>10</sup> The court below erroneously relied upon cases such as *Walling v. Jacksonville Paper Co.*, 317 U. S. 564, involving a statute confined to acts "in" interstate commerce. Compare *Federal Trade Commission v. Pacific States Paper Trade Assn.*, 273 U. S. 52.

4. The Government submits that the decision below should be reviewed not only because it is in conflict with applicable decisions of this Court, but also because it presents important questions concerning the application of the Sherman Act to conspiracies to induce or require producers to sell

<sup>9</sup> This is a necessary inference from the fact that there were some 11,000 licensed jobbers, most of whom would supply only retail service stations located in the same State as the supplying jobber.

<sup>10</sup> *Local 167 v. United States*, 291 U. S. 293, 297; *Swift & Co. v. United States*, 196 U. S. 375, 398; *California Retail Grocers & Merchants Assn., Ltd. v. United States*, 139 F. (2d) 978 (C. C. A. 9), certiorari denied April 24, 1944, No. 787, 1943 Term.

under resale price maintenance contracts establishing minimum retail or wholesale prices, in purported compliance with State fair trade laws and the Miller-Tydings Act of August 17, 1937, 50 Stat. 693. There are now three pending proceedings brought under the Sherman Act involving like issues <sup>11</sup> and it is probable that there will be further proceedings of this kind in the future.

#### CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be granted.

CHARLES FAHY,  
*Solicitor General.*

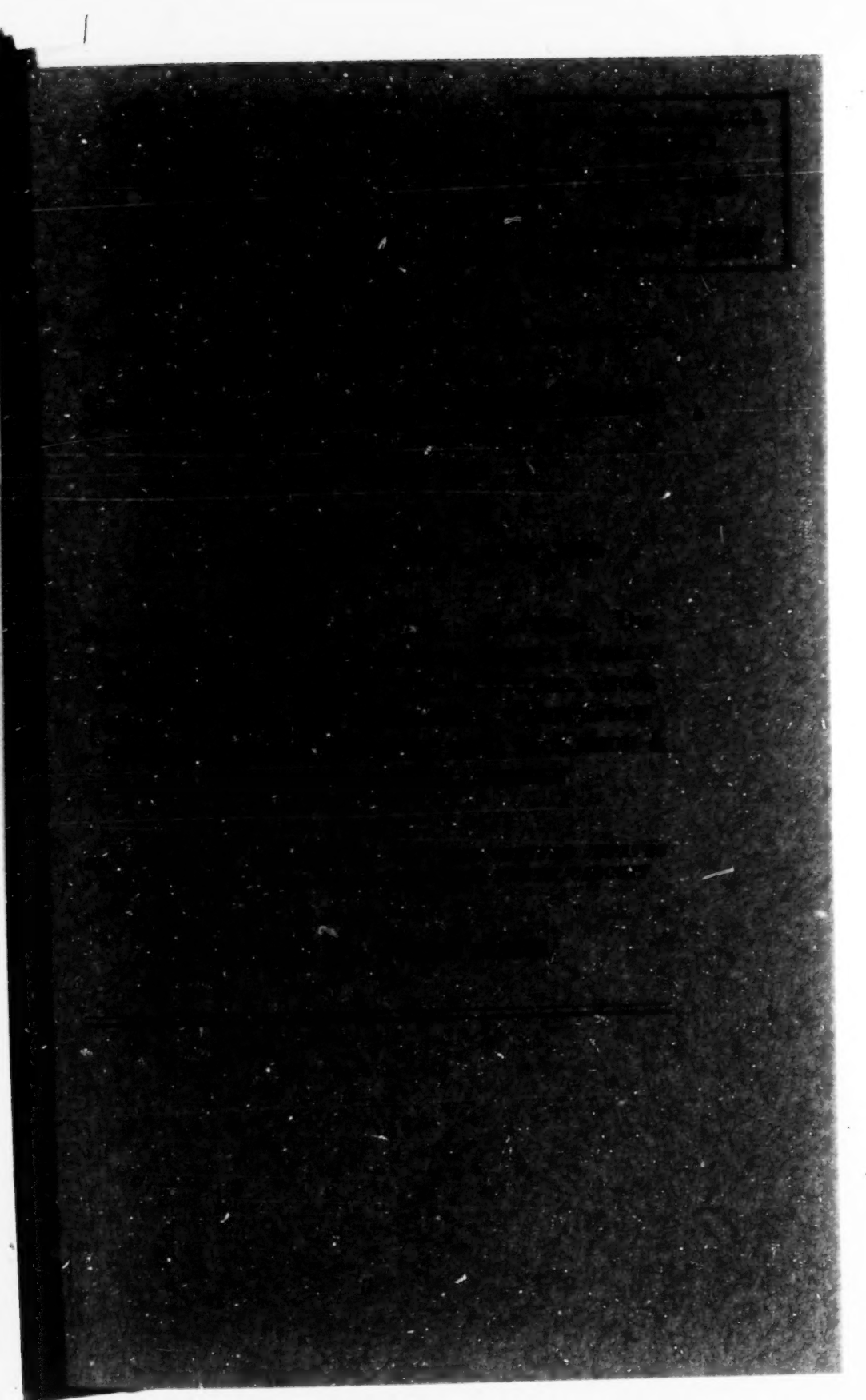
SEPTEMBER 1944.

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<sup>11</sup> *United States v. Nat'l Assn. of Retail Druggists*, No. 683c (Criminal), D. C. N. J.; *United States v. Nat'l Wholesalers' Druggists' Assn.*, No. 618c (Criminal), D. C. N. J.; *United States v. N. Y. State Pharmaceutical Assn.*, No. C-114-75, S. D. N. Y.











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# In the Supreme Court of the United States

OCTOBER TERM, 1944

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Nos. 523-530

UNITED STATES OF AMERICA, PETITIONER

v.

FRANKFORT DISTILLERIES, INC.; NATIONAL DISTILLERS PRODUCTS CORPORATION; BROWN FORMAN DISTILLERS CORPORATION; HIRAM WALKER, INCORPORATED; SCHENLEY DISTILLERS CORPORATION; SEAGRAM-DISTILLERS CORPORATION; MCKESSON & ROBBINS, INCORPORATED; J. E. SPEEGLE

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*ON WRITS OF CERTIORARI TO THE UNITED STATES  
CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT*

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BRIEF FOR THE UNITED STATES

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## OPINION BELOW

The opinion of the Circuit Court of Appeals (R. 81) is reported in 144 F. (2d) 824. The opinion of the district court (R. 32) is reported in 47 F. Supp. 160.

## JURISDICTION

The judgments of the Circuit Court of Appeals were entered on August 26, 1944 (R. 108-111).

Petition for a writ of certiorari was filed September 30, 1944, and was granted November 13, 1944. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925, and as modified by Rule XI of the Criminal Appeals Rules.

#### QUESTIONS PRESENTED

The questions presented by the petitioner are:

(1) Whether a conspiracy by Colorado retailers and wholesalers and out-of-State producers of alcoholic beverages to subject such beverages, when shipped into Colorado from other States, to contracts providing for price maintenance on retail resale within the State is in restraint of interstate commerce, in violation of the Sherman Act.

(2) Whether a boycott by Colorado retailers of certain producers and wholesalers engaged in bringing alcoholic beverages from other States for resale in Colorado is in restraint of interstate commerce, in violation of the Sherman Act.

The respondents will probably present the following additional questions:

(3) Whether any statutes of Colorado have the effect, by force of the Twenty-first Amendment, of making the prohibitions of the Sherman Act inapplicable to the acts with which the respondents are charged.

(4) Whether the indictment fails to specify with sufficient definiteness the offense charged therein.

**STATUTE AND CONSTITUTIONAL PROVISION INVOLVED**

Section 1 of the Act of July 2, 1890, 26 Stat. 209, known as the Sherman Act, as amended by the Act of August 17, 1937, 50 Stat. 693, 15 U. S. C. 1, provides in part as follows:

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal: *Provided*, That nothing herein contained shall render illegal, contracts or agreements prescribing minimum prices for the resale of a commodity which bears, or the label or container of which bears, the trade mark, brand, or name of the producer or distributor of such commodity and which is in free and open competition with commodities of the same general class produced or distributed by others, when contracts or agreements of that description are lawful as applied to intrastate transactions, under any statute, law, or public policy now or hereafter in effect in any State, Territory, or the District of Columbia in which such resale is to be made, or to which the commodity is to be transported for such resale, \* \* \*: *Provided further*, That the preceding proviso shall not make lawful



any contract or agreement, providing for the establishment or maintenance of minimum resale prices on any commodity herein involved, between manufacturers, or between producers, or between wholesalers, or between brokers, or between factors, or between retailers, or between persons, firms, or corporations in competition with each other. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a misdemeanor, \* \* \*.

Section 2 of the Twenty-first Amendment to the Federal Constitution provides:

The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.

Pertinent provisions of certain Colorado statutes upon which the respondents may rely by way of defense are set forth in the Appendix, *infra*, pp. 35-37.

#### STATEMENT

An indictment in two counts returned in the United States District Court for the District of Colorado charged respondents<sup>1</sup> and certain other defendants with violating Section 1 of the Sher-

<sup>1</sup> Of the eight respondents, six are producers of alcoholic beverages located outside of Colorado (R. 3), one is a wholesaler of such beverages doing business in Colorado (R. 3, 4), and one is a Colorado retailer of such beverages (R. 3, 4, 6).

man Act. After demurrers to the indictment and motions to quash had been overruled the Government, having been required to elect between the two counts, elected to stand on the second and the first count was quashed (R. 39-40). The respondents then pleaded *nolo contendere* to the second count and took separate appeals to the court below from the judgments entered against them (R. 42-56).<sup>2</sup> That court reversed the judgments upon the ground that the indictment failed to show that the conspiracy charged in the second count was in restraint of interstate commerce.

The defendants named in the indictment are various producers of alcoholic beverages who ship their product into Colorado from points outside the State, various wholesalers and retailers of these products doing business within the State, an association of such wholesalers, and an association of such retailers (R. 3-7, 12).

The second count of the indictment, prior to the charge of conspiracy, alleges that more than 98% of all spirituous liquors<sup>3</sup> and more than 80%

<sup>2</sup> The Government in the court below did not question, and it is not questioning in this Court, the right of respondents to take appeals, based upon the alleged invalidity of the indictment, from judgments entered upon pleas of *nolo contendere*. See *Edwards v. United States*, 312 U. S. 473, 474, 478. Cf. *United States v. Norris*, 281 U. S. 619, 621-622; *Hudson v. United States*, 272 U. S. 451.

<sup>3</sup> The words "spirituous liquor" are defined for purposes of the indictment as meaning any beverage containing 24% or more of alcohol, by volume (R. 2).

of all wines consumed in Colorado are produced outside the State and that about 1,150,000 gallons of spirituous liquors and about 800,000 gallons of wines are annually shipped into Colorado from other States for consumption in Colorado (R. 8, 12). It alleges that the defendant wholesalers handle more than 75% of the spirituous liquors and wines sold at wholesale in Colorado (*ibid.*). It also alleges that alcoholic beverages are marketed in Colorado by means of a continuous flow of shipments from producers outside the State, through wholesalers and retailers, to consumers in the State and that under the laws of Colorado alcoholic beverages shipped and sold in bottles by the producers may be sold to Colorado retailers only by wholesalers licensed as such under the laws of Colorado (R. 7, 12).

The charge of conspiracy in the second count is set forth in paragraphs 30-32 of the indictment. Paragraph 30 charges (R. 12-13) that "all of the defendants" have been engaged since January 1936 in a conspiracy to raise, fix, and maintain the retail prices of alcoholic beverages shipped into Colorado from producers located outside the State by raising, fixing, and stabilizing retail mark-ups and profit margins on such beverages, and that this conspiracy is in restraint of interstate commerce.

Paragraph 31 in part charges (R. 13) that it is and has been a part of this conspiracy:

(a) That the defendants discuss, agree upon, and adopt high and noncompetitive retail prices, mark-ups, and margins of profit (R. 13).

(b) That the defendant retailers and wholesalers agree upon and undertake a program to induce and compel producers and wholesalers to enter into fair trade contracts affecting every type and brand of alcoholic beverages shipped into the State of Colorado and to establish by said contracts high and arbitrary retail prices embodying the high, arbitrary, and noncompetitive retail mark-ups and margins of profit agreed upon by the defendants (R. 13).

(c) That as a part of this program the defendant association of Colorado retailers prepare and adopt forms of fair trade contracts acceptable to its members and agree with producers and wholesalers upon the forms of such contracts to be used by the latter (R. 13).

(d) That said defendant association circulate among its retail members bulletins listing the names of producers and wholesalers entering into, and the names of those not entering into, fair trade contracts; that the defendant retailers agree to and do patronize only those producers and wholesalers who make such contracts and who compel observance of the minimum retail prices established therein; that the defendant retailers agree to and do withhold their patronage from producers and wholesalers who fail or refuse to enter into

fair trade contracts embodying the agreed retail prices, mark-ups, and margins of profit (R. 13-14).

(e) That in connection with revisions in the retail prices established by said fair trade contracts, defendant retailers agree with defendant producers and wholesalers as to such revisions as will maintain the agreed retail mark-ups and margins of profit (R. 14).

(f) That the defendant retailers threaten to boycott and do boycott wholesalers and producers who sell their products to retailers who do not observe the retail prices, mark-ups and margins of profit established by the fair trade contracts upon which the defendants have agreed; that to finance these activities defendants agree upon and provide for the collection of an extra charge added to the wholesale price, the proceeds thereof to be paid to the defendant association of wholesalers and the defendant association of retailers (R. 14).

Paragraph 32 alleges that the defendants have regularly and continuously carried out the foregoing conspiracy (R. 15).

The indictment alleges that the effect of the defendants' conspiracy has been to fix, stabilize, and maintain the retail prices of alcoholic beverages shipped in interstate commerce into Colorado, at levels approved by the defendants; to eliminate price competition among defendant retailers in the sale and distribution of such beverages; and

to restrain and suppress interstate commerce in alcoholic beverages not covered by fair trade contracts (R. 15).

Respondents' appeals were considered in the court below by the full bench.<sup>4</sup> The court held that the indictment adequately informed respondents of the essential elements of the offense with which they were charged (R. 88-90). It also held that exercise of State authority over importation of intoxicating liquor into Colorado, pursuant to the Twenty-first Amendment, had not removed the authority of Congress to deal with conspiracies in restraint of such importations (R. 91-92). But the court held the indictment invalid upon the ground that it failed to show that the defendants' conspiracy was in restraint of interstate commerce (R. 93-95). This conclusion appears to rest on two assumptions as to the application of the Sherman Act: (1) that a conspiracy to enter into resale price maintenance agreements covering articles moving in interstate commerce is not in restraint of such commerce if the sales on which prices are

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<sup>4</sup> The respondents' appeals, together with appeals involving the validity of two other indictments returned under the Sherman Act, were set down together for rehearing before the full bench and the opinion rendered on rehearing covers all three cases (R. 80-81). The two other cases decided at the same time are *United States v. Safeway Stores, Inc.*, certiorari denied, November 6, 1944, and *United States v. Kroger Grocery & Baking Co.*, certiorari denied, November 20, 1944.

maintained are intrastate sales<sup>\*</sup> and (2) that a conspiracy to boycott the goods of a producer, if carried out by refusing to purchase his goods from his vendees, is not in restraint of the trade between the producer and his vendees.<sup>\*</sup>

**SPECIFICATION OF ERRORS TO BE URGED**

The Circuit Court of Appeals erred:

(1) In holding count two of the indictment invalid.

(2) In holding that a conspiracy to subject articles moving in interstate commerce to resale price maintenance contracts is not in restraint of interstate commerce if the sales on which prices are thus maintained are intrastate sales.

(3) In holding that a conspiracy by retailers to boycott producers and wholesalers engaged in shipping alcoholic beverages into Colorado from points outside the State is not in restraint of interstate commerce.

(4) In reversing the judgments of the district court and dismissing the indictment as to respondents.

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<sup>\*</sup> The court seemed to think that all allegations of the indictment other than the charge of boycotting were disposed of by the fact that the indictment charged price-fixing only in retail sales and did not charge fixing the prices at which producers sold to wholesalers (R. 93, 94).

<sup>\*</sup> The court said that since the law of Colorado does not permit retailers in that State to purchase liquor from out-of-State producers (R. 93), the allegations of the indictment that retailers boycotted producers are "ineffective in charging an offense under the Sherman Act" (R. 94).



## SUMMARY OF ARGUMENT

## I

The indictment explicitly charges a conspiracy to procure the shipment of alcoholic beverages into Colorado from other States under contracts providing for price maintenance on retail sale of the imported beverages. This conspiracy restrains and tends to suppress the interstate sale and shipment of alcoholic beverages not subject to such contract restrictions. It likewise restrains the competition in interstate commerce of such beverages and it makes interstate commerce the vehicle for price fixing and price maintenance. It has been consistently held that agreements of this kind for the sale of goods in interstate commerce under price maintenance contracts violate the Sherman Act irrespective of whether the resale on which price is maintained is an intrastate or interstate transaction. *United States v. Univis Lens Co.*, 316 U. S. 241; *United States v. Bausch & Lomb Co.*, 321 U. S. 707; *Ethyl Gasoline Corp. v. United States*, 309 U. S. 436.

Since the indictment charges horizontal agreement among producers, among wholesalers, and among retailers, to procure the making of contracts providing for resale price maintenance, the agreement among competing members of these groups and with members of the other groups, as charged in this case, is not within any exemption from Section 1 of the Sherman Act given by the Miller-Tydings Act of August 17, 1937.

The indictment charges that, as a part of the conspiracy among producers, wholesalers, and retailers, the defendant retailers agreed to withhold their patronage from producers and from wholesalers who do not enter into contracts providing for price maintenance on retail sale of alcoholic beverages which the producers and wholesalers bring into Colorado from other States. As to the boycotted wholesalers, this conspiracy restrains their interstate trade by narrowing the outlets through which they can sell. Agreements not to deal entered into for the purpose and with the effect of adversely affecting the interstate trade of a person violate the Sherman Act although the agreement not to deal relates to and operates immediately upon transactions which are intrastate. It is, of course, settled that the Sherman Act applies to conspiracies which bring about a restraint of interstate commerce by means of acts which themselves are intrastate. *Local 167 v. United States*, 291 U. S. 293, 297.

The same considerations govern the conspiracy to boycott certain producers for the purpose of compelling them to carry on interstate trade in the manner desired by the combining group. The fact that in their case the boycott operates upon their product in the hands of their vendees is immaterial. *Loewe v. L. Lor*, 208 U. S. 274; *Fashion Originators' Guild, Inc. v. Federal Trade*

*Commission*, 312 U. S. 457. The beverages of the producers all bear brand names and the boycott of their products therefore lost none of its effectiveness by reason of intermediate purchase by Colorado wholesalers.

Since a restraint of interstate commerce is set forth whether or not the interstate movement of imported beverages ended with their delivery to wholesalers in Colorado, it is unnecessary to pass upon the correctness of the ruling below that the interstate movement terminated with such delivery.

### III

This Court has held that the Twenty-first Amendment does not deprive the Federal Government of all regulatory power over interstate commerce in intoxicating liquors, and the only question arising under the Amendment is whether the Sherman Act, as here applied, interferes with laws enacted by Colorado to regulate traffic in liquor. But the Fair Trade Act, the Unfair Practices Act, and the Liquor Code of Colorado do not sanction, directly or by implication, conspiracy among competitors to maintain minimum resale prices and profit margins on the retail sale of intoxicating beverages. Condemnation of defendants' conspiracy in fact accords with, rather than conflicts with, the policy of these laws. Nor does the possibility that the present application of the Sherman Act might decrease the State's revenue

from excise taxes upon intoxicating liquors raise any question under the Twenty-first Amendment. That Amendment confers upon the States no taxing powers in derogation of federal powers granted by the Constitution.

#### IV

The indictment in this case sets forth the elements of the offense charged in terms which clearly define the scope and character of defendants' conspiracy. Any particularity as to the time, place, or circumstances of the participation of individual defendants in the conspiracy which might be necessary to enable any defendant to meet the charge against him is the proper function of a bill of particulars.

#### ARGUMENT

##### I

RESPONDENTS' CONSPIRACY TO SUBJECT TO RESALE PRICE MAINTENANCE AGREEMENTS ALCOHOLIC BEVERAGES SHIPPED INTO COLORADO FROM OTHER STATES IS IN ILLEGAL RESTRAINT OF INTERSTATE COMMERCE

The court below declared that the conspiracy charged in the indictment was "essentially one to fix and maintain prices at which alcoholic beverages shall be sold at retail in Colorado" (R. 93). But assuming that this is a correct characterization of the conspiracy charged, a conspiracy in restraint of interstate commerce is not beyond the scope of the Sherman Act because it

also restrains intrastate commerce. Allegations of restraint of interstate commerce are not to be ignored upon the ground that the parties' primary aim in conspiring to restrain such commerce was to fix, maintain and stabilize prices on intrastate sales.

The indictment in the present case explicitly charges (par. 31 (b), R. 13) that the defendants conspired to procure the shipment of alcoholic beverages into Colorado from other States under price maintenance contracts, i. e., under contracts establishing the prices, mark-ups and profit margins to be charged and exacted by the retailer purchasers of these beverages. This, as we shall presently show, was a conspiracy in restraint of interstate commerce. Moreover, such restraint, if this be material, was a primary objective of the conspiracy. Numerous allegations show this to be a central and essential part of the conspiracy.<sup>7</sup>

A contract under which a producer sells alcoholic beverages to a Colorado wholesaler for shipment into Colorado from the State of production

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<sup>7</sup> It is alleged, among other things, that the defendants agreed (1) upon the forms of fair trade contracts embodying the agreed retail mark-ups and profit margins, (2) upon revisions of the terms of such contracts designed to maintain the agreed retail mark-ups and profit margins, (3) upon the circulation among retailers of a white list of producers and wholesalers making such contracts and a black list of those who did not, and (4) upon the boycotting by retailers of producers and wholesalers supplying retailers who do not observe the retail prices, mark-ups and margins of profit established by the contracts (R. 13-14). See *supra*, pp. 6-8.

and the resulting movement into the State of destination are obviously interstate commerce.<sup>8</sup> We submit that it is equally obvious that interstate commerce is restrained by a conspiracy to induce and compel those engaged in such commerce to sell exclusively under contracts providing for fixing and maintaining the price of the product on subsequent resale. Such a conspiracy is directed at preventing the interstate sale and movement of beverages not subject to such contract restrictions and at preventing the competition in commerce of these beverages. Such a conspiracy makes interstate sales and shipments the vehicle for price fixing and price maintenance. It is settled that, apart from the exemptions given by the Miller-Tydings Act, agreements for the sale of goods in interstate commerce under contracts providing for resale price maintenance violate the Sherman Act irrespective of whether the resale on which price is maintained is intrastate or interstate.

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<sup>8</sup> In this connection it is immaterial that regulations issued under the Colorado Liquor Code require that all alcoholic liquor coming into the State for sale therein "be the sole and exclusive property of and subject to the unrestricted power of disposal of a" Colorado wholesaler at the time the liquor crosses the State line (R. 93). The Colorado wholesaler was purchasing in interstate commerce under a price maintenance contract just as much as the producer was selling in interstate commerce under such a contract. Furthermore, mere change of legal title or custody is not the measure of interstate commerce. *East Ohio Gas Co. v. Tax Commission*, 283 U. S. 465, 470.

In *United States v. Univis Lens Co.*, 316 U. S. 241, the defendants sold multifocal lenses both to wholesalers and to retailers. The contracts with both classes of distributors provided for resale price maintenance. As to retailers at least, the resale on which price was fixed was necessarily intrastate since the retailer was authorized to sell (see pp. 244, 245) only to consumers of the lenses. This Court, in holding that the contracts with retailers, as well as those with wholesalers, violated the Sherman Act, said (pp. 252-253):

Agreements for price maintenance of articles moving in interstate commerce are, without more, unreasonable restraints within the meaning of the Sherman Act \* \* \* and restrictions imposed by the seller upon resale prices of articles moving in interstate commerce were, until the enactment of the Miller-Tydings Act, 50 Stat. 693, consistently held to be violations of the Sherman Act.

*United States v. Bausch & Lomb Co.*, 321 U. S. 707, likewise held that a conspiracy on the part of those selling in interstate commerce to maintain prices in sales by retailers to ultimate consumers is a conspiracy in restraint of interstate commerce prohibited by the Sherman Act. In that case a company engaged in distributing pink-tinted lenses, which it sold exclusively to wholesalers, combined with them to maintain a distribution system under which the retailers to whom



the wholesalers resold were required to maintain, on sales to consumers, the prices prevailing in the locality in which the retailer was located, and were otherwise limited in their freedom of trade. The district court held that the conspiracy to exercise control over prices and terms in retail sales violated the Sherman Act and enjoined continuance thereof. This Court affirmed the judgment. With reference to the application of the conspiracy to retail sales this Court, after noting that the Soft-Lite appellants had frankly conceded the illegality of this aspect of the conspiracy, said (pp. 719-720):

Our former decisions compel this conclusion. Price fixing, reasonable or unreasonable, is "unlawful *per se*." [Citing cases.] The retailer's price to his customer is the single source of stable profits for all handlers.

*Dr. Miles Medical Co. v. Park & Sons Co.*, 220 U. S. 373, and *Ethyl Gasoline Corp. v. United States*, 309 U. S. 436, are similar holdings. In the latter case the defendants' jobber licensing system was held illegal under the Sherman Act because the contracts under which the Ethyl Corporation authorized refiners to use and sell its patented fluid provided for control by Ethyl of the prices and business practices of the jobbers to whom the refiners sold. The facts make it clear that most of the jobbers whose sales prices and

practices were thus controlled sold exclusively in intrastate commerce.\*

Certain respondents, in opposing certiorari in the present case, urged that the *Univis*, *Dr. Miles Medical*, and *Ethyl* cases are to be distinguished from the present one upon the ground that they involved "comprehensive systems of price maintenance initiated by a producer" and upon the ground that they covered "both wholesale and retail transactions, affecting interstate as well as intrastate sales" (Brief on behalf of Frankfort Distilleries, Inc., et al., p. 7). We submit that the suggested grounds of distinction are without substance. In an agreement to sell in interstate commerce under price maintenance contracts, the restraint and its application to interstate commerce are the same whether the agreement is initiated by the producer or by vendees of the product. The cited decisions are also not distinguishable upon the ground that the conspiracies in those cases were more "comprehensive." In the first place, the illegality of a conspiracy in restraint of interstate commerce is not dependent upon the quantum of commerce subjected to restraint (*United States v. Socony-Vacuum Oil Co.*, 310 U. S. 150, n. 59 at p. 225) and, in the second place, the trade restrained in the present case is certainly more

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\* Since there were some 11,000 licensed jobbers, most of them must have served only retail service stations located in the State of the supplying jobber.

comprehensive than that subjected to restraint in the *Univis* case.<sup>10</sup> As to respondents' assumption that their conspiracy did not cover wholesale transactions or affect interstate sales, it should be noted that the conspiracy affected the "interstate sales" from producers to Colorado wholesalers and covered "wholesale transactions", it being a part of the conspiracy that the Colorado wholesalers sell under contracts providing for price maintenance on retail sales. The indictment specifically alleges that an effect of the conspiracy was "to restrain and suppress interstate trade and commerce in alcoholic beverages not covered by fair trade contracts" (R. 15).

The reason why interstate commerce is illegally restrained by a conspiracy to induce or compel the interstate shipment of goods under contracts fixing or maintaining prices on resale of the goods at retail within the State of destination is well stated in *United States v. Food & Grocery Bureau of So. Cal.*, 43 F. Supp. 966, 972 (S. D. Calif.), affirmed 139 F. (2d) 973 (C. C. A. 9):

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<sup>10</sup> Respondents' conspiracy covered every type and brand of alcoholic beverage shipped into the State of Colorado (*supra*, p. 7) whereas the *Univis* combination covered only the output of a single manufacturer of multifocal lenses. And in the present case the conspiracy applied to trade amounting annually to over 1,000,000 gallons of spirituous liquors and some 800,000 gallons of wines (*supra*, p. 6), a trade patently of a value far in excess of the \$1,000,000 annual sales volume of the *Univis* defendants (316 U. S. 241, 246).

But prices fixed in advance to affect a product at the end of its interstate journey are an interference with that commerce, although, at the time the sale is actually made, the product originating in interstate commerce may actually have come to rest on the shelf of a retailer. It is the agreement on the price, *in advance*, which constitutes the violation, not the sale at the price.

See also *California Retail Grocers and M. Ass'n. v. United States*, 139 F. (2d) 978, 983 (C. C. A. 9), certiorari denied, 322 U. S. 729. Compare, *Interstate Circuit, Inc., v. United States*, 306 U. S. 208; *United States v. General Motors Corp.*, 121 F. (2d) 367 (C. C. A. 7), certiorari denied, 314 U. S. 618, 707.

Respondents are not within any exemption given by the Miller-Tydings Act of August 17, 1937. That act amended Section 1 of the Sherman Act so as to exclude therefrom resale price maintenance contracts valid under the law of the State of resale, but the amendatory act provides (*supra*, pp. 3-4) that it shall not legalize agreements for such contracts entered into between producers, or between wholesalers, or between retailers. The present indictment charges that large groups of producers, of wholesalers, and of retailers, engaged in a common conspiracy to procure the making of resale maintenance price contracts. Agreement between producers, between wholesalers, and between retailers, for the making of

such contracts, therefore stands admitted on the pleadings. In addition, the indictment specifically charges agreement by the retailers with one another to bring about and enforce a system of selling under resale price maintenance contracts.<sup>11</sup>

Defense under the Miller-Tydings Act was pressed in the court below, but that court evidently considered the defense as plainly, without merit. Its opinion does not make even a passing reference to the question.

## II

THE ALLEGATION THAT, AS A PART OF RESPONDENTS' CONSPIRACY, THE DEFENDANT RETAILERS BOYCOTTED WHOLESALERS AND PRODUCERS WHO DID NOT ENTER INTO OR ENFORCE RESALE PRICE CONTRACTS AS TO THE ALCOHOLIC BEVERAGES WHICH THEY SHIPPED INTO COLORADO FROM OTHER STATES, SETS FORTH A CONSPIRACY IN RESTRAINT OF INTERSTATE COMMERCE

The indictment charges that it is a part of the conspiracy for defendant retailers to withhold their patronage from producers and wholesalers, engaged in shipping alcoholic beverages into Colorado from other States, who do not enter into contracts providing for maintenance of the agreed retail prices and profit margins (par. 31 (d), R. 13-14), and for defendant retailers to boycott producers and wholesalers, engaged in such ship-

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<sup>11</sup> See particularly paragraphs 31 (c), 31 (d), and 31 (f), R. 13, 14.

ments, who supply retailers not observing the agreed retail prices and profit margins (par. 31 (f), R. 14).

As to the conspiracy to boycott wholesalers, we submit that a restraint of interstate commerce is plainly set forth. It narrows the outlets to which the boycotted wholesalers can sell and has "both as its necessary tendency and as its purpose and effect the direct suppression of" interstate purchases by the boycotted wholesalers. *Fashion Originators' Guild v. Federal Trade Commission*, 312 U. S. 457, 465. The purpose and effect are to bring economic pressure upon the boycotted wholesalers in order to induce them to conduct their interstate business in the manner desired by the combining group. Since the restraint operates and is intended to operate upon interstate commerce, it is immaterial whether the sales from wholesalers to retailers are in interstate or intrastate commerce. The effect on interstate commerce is similar to that resulting when members of a labor union, in order to bring economic pressure to bear on a manufacturer selling his product outside the State of manufacture, agree to refuse to work for purchasers of the product or agree to refuse to do work upon the product in the hands of purchasers. Such combinations restrain interstate commerce although the restraint is effected by intrastate acts. *Duplex Printing Press Co. v. Deering*, 254 U. S. 443; *Bedford Cut*

*Stone Co. v. Journeymen Stone Cutters' Assn.*,  
274 U. S. 37.<sup>12</sup>

*Local 167 v. United States*, 291 U. S. 293, is likewise pertinent. In that case, live poultry shipped to New York City from various States was delivered at railroad terminals to commission men, called receivers, who sold on the spot to wholesalers, called marketmen, who then trucked the poultry to their places of business and sold it to retailers. The wholesalers and two labor unions cooperating with them conspired to fix prices at which wholesalers sold to retailers and to allocate retailers among the wholesalers. This Court, in rejecting the defense that the conspiracy operated upon commerce in poultry after the interstate movement had ended and therefore did not violate the Sherman Act, said (p. 297):

It may be assumed that some time after delivery of carload lots by interstate carriers to the receivers the movement of the poultry ceases to be interstate commerce. [Citing cases.] But we need not decide when interstate commerce ends and that which is intrastate begins. The control of the handling, the sales and the prices \* \* \* in the State of destination where the interstate movement ends may operate directly to restrain and monopolize inter-

<sup>12</sup> Whatever be the view as to the immunity now given to such combinations by the Clayton Act, this does not impair the authority of the decisions upon the question whether the combinations were in restraint of interstate commerce.



state commerce. [Citing cases.] The Sherman Act denounces every conspiracy in restraint of trade including those that are to be carried on by acts constituting intrastate transactions.

We also submit that the allegation that defendant retailers, pursuant to conspiracy among all the defendants, boycotted producers who did not enter into fair trade contracts as to the alcoholic beverages which they sold for shipment into Colorado from other States, likewise sets forth a conspiracy in restraint of interstate commerce. The court below was of the opinion that this allegation must be disregarded because the laws of Colorado do not permit Colorado retailers to purchase alcoholic beverages from out-of-State producers. But it is settled that a conspiracy to boycott a manufacturer or a producer, by agreeing not to purchase his product from his vendees, may be in restraint of the producer's interstate trade. *Loewe v. Lawlor*, 208 U. S. 274. The complaint in that case, which was held to set forth a violation of the Sherman Act, alleged that the plaintiff manufacturer distributed its hats in interstate commerce by selling them to wholesalers and that the defendants conspired to injure its trade by boycotting its wholesale dealers and the latter's customers.<sup>13</sup>

<sup>13</sup> See paragraphs 5, 20, and 21 of complaint, set forth in a note to the Court's opinion (208 U. S. 274, at pp. 285, 291-296).

In *Fashion Originators' Guild, Inc. v. Federal Trade Commission*, 312 U. S. 457, the Guild members, for the purpose of preventing the sale of garments copied from designs which Guild members had originated, agreed not to sell their own goods to retail stores which had purchased garments copied from their designs. This Court held the combination illegal under the Sherman Act although, just as in the present case, there were no direct dealings between the boycotting group and the producers against whom the boycott was directed.

As stated by respondent Schenley Distillers Corp. in its brief opposing certiorari (p. 5), the alcoholic beverages to which respondents' conspiracy relates bear the trademark, brand, and name of the producer.<sup>14</sup> The beverages of any producer could therefore be readily identified and boycotted following their sale to a wholesaler.

The direct and necessary effect of a boycott by retailers of producers (and of wholesalers) who do not sell under fair trade contracts is to restrain or suppress their interstate trade since their

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<sup>14</sup> Regulations issued pursuant to authority conferred by the Federal Alcohol Administration Act (27 U. S. C. 205 (e)) provide that all domestic distilled spirits shipped in bottle in interstate commerce must bear a label giving the brand name and the distiller's name (Regulations No. 5, Art. III, of Federal Alcohol Administration). Similarly, all domestic wine shipped in containers in interstate commerce must bear a label giving the brand name and the name of the bottler or packer (Regulations No. 4, Art. III, of Federal Alcohol Administration).

market in Colorado is restricted when Colorado retailers refuse to buy their product or their goods. Where restraint of interstate trade in a commodity is "the necessary and direct consequences" of the acts charged against the defendants in a Sherman Act indictment, no "allegation of a specific intent to restrain such trade" is necessary. *United States v. Patten*, 226 U. S. 525, 543.

Since the retailers' boycott restrained the trade of both producers and wholesalers engaged in bringing goods into Colorado from other States, it is immaterial whether the sales from wholesalers to retailers are in interstate or intrastate commerce, and it is unnecessary to consider the application to that question of decisions such as *Walling v. Jacksonville Paper Co.*, 317 U. S. 564, interpreting a statute which is confined to acts "in" interstate commerce. It should, however, be noted that the court below based its holding that sales from wholesalers to retailers are intrastate transactions upon a factual assumption for which the indictment furnishes no support, this assumption being that liquor which a wholesaler brings into Colorado is placed in his warehouse and commingled with his other merchandise before disposition to the retailer (R. 94). Certainly the fact that the wholesaler takes delivery of liquor brought into the State does not show that the interstate movement has terminated. *Binderup v. Pathe Exchange, Inc.*, 263 U. S. 291, 309; *Walling v. Jacksonville Paper Co.*, 317 U. S. 564, 569-570.

## III

THE APPLICATION OF THE SHERMAN ACT TO THE RESPONDENTS IS NOT INVALIDATED BY THE TWENTY-FIRST AMENDMENT OR THE STATUTES OF COLORADO DERIVING SANCTION FROM THE TWENTY-FIRST AMENDMENT

Respondents in the court below urged that the Twenty-first Amendment vests in the States exclusive authority over commerce in intoxicating beverages and deprives Congress, as to them, of all power of regulation derived from the commerce clause. We submit that the contention is without merit and that it has been pointedly rejected by this Court. In *Jameson & Co. v. Morgenthau*, 307 U. S. 171, an attack upon the constitutionality of the Federal Alcohol Administration Act, based upon the foregoing interpretation of the Twenty-first Amendment, was held to be so lacking in substance that a three-judge district court provided for by the Act of August 24, 1937, 50 Stat. 751, to hear suits attacking the constitutionality of a federal statute was without jurisdiction to entertain the suit. In *Arrow Distilleries, Inc., v. Alexander*, 109 F. (2d) 397, 400 (C. C. A. 7), the constitutionality of the Federal Alcohol Administration Act was sustained against attack upon this same ground and this Court denied a petition for certiorari (310 U. S. 646) which assigned the constitutional question as a reason for granting the writ.

Decisions by this Court dealing with the effect of the Twenty-first Amendment on State legislation have upheld the right of the States to exercise their police powers to the fullest extent to control traffic in liquor within their borders and have upheld State action restricting imports into or exports from a State although the restrictions might, but for the Amendment, constitute an invalid encroachment upon the commerce power of Congress.<sup>15</sup> But none of the cases has suggested that the Amendment divests the Federal Government of all independent power to regulate interstate commerce in intoxicating liquors and neither the language nor the history of the Amendment gives any support to this view.

If the Sherman Act as applied in the present case conflicted with legislation of Colorado deriving sanction from the Twenty-first Amendment a constitutional question of Federal or State supremacy would be presented for determination. We submit, however, that there is no such conflict in this case.

Before considering the question of possible conflict as it arises here, we call attention to the holding in *Washington Brewers Institute v. United States*, 137 F. (2d) 964 (C. C. A. 9), certiorari denied, 320 U. S. 776, that a Sherman

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<sup>15</sup> *State Board v. Young's Market Co.*, 299 U. S. 59; *Mahoney v. Triner Corp.*, 304 U. S. 401; *Indianapolis Brewing Co. v. Liquor Commission*, 305 U. S. 391; *Finch & Co. v. McKittrick*, 305 U. S. 395; *Ziffrin, Inc. v. Reeves*, 308 U. S. 132.

Act indictment charging certain brewing companies with fixing the sales prices of beer in California, Idaho, Oregon, and Washington did not involve an application of the Sherman Act incompatible with the policy embodied in the liquor-control legislation of the States in question. One of the requirements of the California legislation was that the importer, wholesaler, and manufacturer publicly post its beer prices and adhere to its posted prices. Highly restrictive legislation regulating traffic in beer had been adopted by the other three States. The court, in holding that prohibition of the brewers' combination under the provisions of the Sherman Act did not interfere with the enforcement of State regulatory laws, said (p. 968):

The state laws regulatory of the traffic in malt liquors are directed toward individual conduct. Obedience to them is not rendered difficult or impracticable by the enforcement of a federal statute declaring price-fixing combinations unlawful. In arriving at prices to be charged for their commodity brewers are not required by the states to act otherwise than as free agents, nor are they expected to confederate together with the design of suppressing legitimate competition in respect either of quality or of price.

A brief review of the Colorado legislation relied on by respondents will show that it does not sanction, directly or by implication, the kind of

confederation among competitors for price maintenance and price control charged in this case.<sup>16</sup>

The Colorado Fair Trade Act (*infra*, pp. 35-36) makes it lawful, under certain conditions, to incorporate in a sales contract the requirement that the buyer will not resell, and that he will require a purchaser from him not to resell, at less than the minimum price stipulated by the seller. But, like the Miller-Tydings Act, the statute expressly provides (Sec. 2) that it does not apply to horizontal agreements among producers, among wholesalers, or among retailers, "as to sale or resale prices". Since the present indictment charges such horizontal agreement among competitors (*supra*, pp. 21-22), the acts charged fall outside of the provisions and policy of the Colorado Fair Trade Act.

Respondents' conspiracy is equally not within Section 17 (t) of the Colorado Liquor Code (*infra*, p. 37). This section does not extend the scope of the Fair Trade Act; the section merely gives enforceability to resale prices for alcoholic beverages established in contracts entered into under the Colorado Fair Trade Act.

The Colorado Unfair Practices Act (Sec. 3, *infra*, pp. 36-37) makes it unlawful to sell goods

<sup>16</sup> In a decision rendered prior to the enactment of the legislation in question, the Colorado Court of Appeals held such a combination unlawful under the Colorado common law. *Denver Jobbers' Assn. v. The People*, 21 Col. App. 326 (1912).



below cost "for the purpose of injuring competitors and destroying competition". Section 12 of the Act (*infra*, p. 37) declares that its purpose is "to safeguard the public against \* \* \* monopolies and to foster and encourage competition" and it has been declared not to be "a price-fixing law" (*Dikeou v. Food Distributors Ass'n.*, 107 Colo. 38, 50). The practices which it condemns are obviously far removed from anything charged against respondents. Sale of alcoholic beverages other than under price maintenance contracts cannot be assumed to be synonymous with sale below cost. The declared purposes of the legislation are not only not in conflict with, but they bear a close affinity to, those of the Sherman Act.

The brief of the Attorney General of Colorado filed in opposition to certiorari emphasizes (1) the importance of the State excise taxes on liquor as a source of revenue and (2) the part played by licensed wholesalers in collecting these taxes. The brief does not suggest that exercise of federal power to strike down or punish respondents' conspiracy would in any way interfere with the State system of collecting excise taxes through wholesalers. The Attorney General did suggest in the court below that "unrestricted wholesale competition" would encourage the bootlegger and decrease State revenues (see *Schenley* brief in opposition to certiorari, p. 15). We had supposed that it was high rather than low prices which "tilled and fertilized" the soil from which the

bootlegger springs, but irrespective of this consideration the Twenty-first Amendment confers upon the States no taxing powers in curtailment of otherwise existing federal power.

#### IV

##### THE INDICTMENT ADEQUATELY SPECIFIES THE OFFENSE CHARGED AGAINST RESPONDENTS

We submit that our prior statement of the allegations of the indictment (*supra*, pp. 5-9) shows that it sets forth "the elements of the offense intended to be charged" and apprises the defendants of the accusation, as distinguished from the evidence, which they must be prepared to meet. *Hagner v. United States*, 285 U. S. 427, 431. Various specified acts and agreements constituting part of defendants' conspiracy and the nature of the participation therein by each of the three groups of defendants, producers, wholesalers, and retailers, are alleged. The indictment does not, nor should it properly, plead evidentiary facts such as the circumstances or character of each individual defendant's participation in the conspiracy. Any further "particularity of time, place, circumstances," of this nature, if necessary in order to enable any defendant to prepare his defense, falls within the scope of a bill of particulars. *Glasser v. United States*, 315 U. S. 60, 66.

The full bench of the Tenth Circuit in a rehearing of the question whether the offense was adequately specified, as this question arose both in

the present case and in two other cases of indictments under the Sherman Act, sustained (one judge dissenting) the validity in this respect of each of the three indictments.<sup>17</sup> Two recent decisions of the Circuit Court of Appeals for the Fifth Circuit involving Sherman Act indictments in which the offense was set forth with at least as much generality as in the present indictment sustained the indictments against the charge that they were fatally indefinite. *United States v. N. Y. Great Atlantic & Pacific Tea Co.*, 137 F. (2d) 459, certiorari denied, 320 U. S. 783; *United States v. Tarpon Springs Sponge Exchange*, 142 F. (2d) 125.

#### CONCLUSION

It is respectfully submitted that the judgments of the court below should be reversed, with directions to affirm the judgments of conviction entered by the district court.

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WENDELL BERGE,  
*Assistant Attorney General.*

✓ EDWARD H. LEVI,

✓ CHARLES H. WESTON,

✓ MATTHIAS N. ORFIELD,

*Special Assistants to the Attorney General.*

JANUARY 1945.

<sup>17</sup> The other two indictments were held valid in all respects and this Court has denied writs of certiorari. *Safeway Stores, Inc., v. United States* (No. 481), certiorari denied, November 6, 1944; *Kroger Grocery & Baking Co. v. United States* (No. 557), certiorari denied, November 20, 1944.

## APPENDIX

### COLORADO FAIR TRADE ACT<sup>1</sup>

SECTION 1. No contract relating to the sale or resale of a commodity which bears, or the label or container of which bears, the trade-mark, brand or name of the producer or distributor of such commodity, and which commodity is in free and open competition with commodities of the same general class produced or distributed by others shall be deemed in violation of any law of the State of Colorado by reason of any of the following provisions which may be contained in such contract:

(a) That the buyer will not resell such commodity at less than the minimum price stipulated by the seller.

(b) That the buyer will require of any dealer to whom he may resell such commodity an agreement that he will not, in turn, resell at less than the minimum price stipulated by the seller.

\* \* \* \* \*

SECTION 2. This Act shall not apply to any contract or agreement between or among producers or between or among wholesalers or between or among retailers as to sale or resale prices.

\* \* \* \* \*

SECTION 4. Wilfully and knowingly advertising, offering for sale or selling any commodity at less than the price stipulated in any contract entered into pursuant to the provisions of this Act.

<sup>1</sup> 1937 Session Laws, Chapter 146.

whether the person so advertising, offering for sale, or selling is or is not a party to such contract, is unfair competition and is actionable at the suit of any person damaged thereby.

### COLORADO UNFAIR PRACTICES ACT<sup>2</sup>

SECTION 3. It shall be unlawful for any person, partnership, firm, corporation, joint stock company, or other association engaged in business within this State, to sell, offer for sale or advertise for sale any article or product, or service or output of a service trade for less than the cost thereof to such vendor, or give, offer to give or advertise the intent to give away any article or product, or service or output of a service trade for the purpose of injuring competitors and destroying competition and he or it shall also be guilty of a misdemeanor, and on conviction thereof shall be subject to the penalties set out in Section 11 of this act for any such act.

(a) The term "cost" \* \* \* as applied to distribution "cost" shall mean the invoice or replacement cost, whichever is lower, of the article or product to the distributor and vendor plus the cost of doing business by said distributor and vendor.

(b) The "cost of doing business" or "overhead expense" is defined as all costs of doing business incurred in the conduct of such business and must include without limitation the following items of expense: labor (including salaries of executives and officers), rent, interest on borrowed capital, depreciation, selling cost, maintenance of equip-

<sup>2</sup> 1941 Session Laws, Chapter 227, amending and reenacting 1937 Session Laws, Chapter 261.

ment, delivery cost, credit losses, all types of licenses, taxes, insurance and advertising.

\* \* \* \* \*

SECTION 12. The Legislature declares that the purpose of this Act is to safeguard the public against the creation or perpetuation of monopolies and to foster and encourage competition, by prohibiting unfair and discriminatory practices by which fair and honest competition is destroyed or prevented. This act shall be literally construed that its beneficial purposes may be subserved.

### COLORADO LIQUOR CODE

\* \* \* \* \*

SECTION 17. It shall be unlawful for any person:

\* \* \* \* \*

(t) To wilfully and knowingly advertise or offer for sale or sell any malt liquors, vinous liquors, spirituous liquors and alcoholic beverages whether the person so advertising, offering for sale or selling is or is not a party to such contract, at less than the price stipulated in any contract entered into pursuant to the provisions of the Fair Trade Act, the same being Chapter 146, Session Laws of Colorado, 1937.

<sup>1</sup>Colorado Statutes Annotated, 1935, Chapter 89, as amended by 1941 Session Laws, Chapter 160.





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STEFAN MORE CROPLEY  
CLERK

IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1944.

**Nos. 523-530**

UNITED STATES OF AMERICA,

*Petitioner,*

*v.*

FRANKFORT DISTILLERIES, INC.; NATIONAL DISTILLERS PRODUCTS CORPORATION; BROWN FORMAN DISTILLERS CORPORATION; HIRAM WALKER, INCORPORATED; SCHENLEY DISTILLERS CORPORATION; SEAGRAM DISTILLERS CORPORATION; McKESSON & ROBBINS, INCORPORATED; J. E. SPEEGLE.

**BRIEF IN OPPOSITION TO PETITION FOR  
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IN THE  
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UNITED STATES OF AMERICA,

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FRANKFORT DISTILLERIES, INC.; NATIONAL DISTILLERS PRODUCTS CORPORATION; BROWN FORMAN DISTILLERS CORPORATION; HIRAM WALKER, INCORPORATED; SCHENLEY DISTILLERS CORPORATION; SEAGRAM DISTILLERS CORPORATION; McKESSON & ROBBINS, INCORPORATED; J. E. SPEEGLE.

---

**BRIEF OF FRANKFORT DISTILLERIES, INC., NATIONAL DISTILLERS PRODUCTS CORPORATION, BROWN FORMAN DISTILLERS CORPORATION, HIRAM WALKER INCORPORATED, SEAGRAM DISTILLERS CORPORATION, and McKESSON & ROBBINS, INCORPORATED, IN OPPOSITION TO PETITION FOR WRITS OF CERTIORARI.**

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**STATEMENT.**

The petition, in summarizing the allegations of the indictment with respect to the nature of the business involved, omits all mention of the vital allegation that "Under the laws of the State of Colorado, alcoholic beverages shipped and sold in bottles by producers thereof may be sold to retailers in the State of Colorado only by whole-

salers licensed as such under the laws of Colorado" (R. 13). As the lower court recognized, even this allegation is an incomplete statement of the effect of the Colorado liquor laws upon this business.

The law of Colorado, to effectuate a policy of border control, requires all alcoholic liquors to be the sole and exclusive property of a duly licensed Colorado wholesaler at the time such liquors cross the Colorado State line (Regulation 12 C of the State Licensing Authority). Under the Colorado law all such liquors must be affixed by the state licensed wholesaler with the proper excise tax stamp before sale or transfer within the State (Regulation 1(3)).<sup>1</sup> In other words, before liquor imported into Colorado can be sold or offered for sale to any retailer it must

<sup>1</sup> The regulations were promulgated by the State Licensing Authority pursuant to Section 23(c) of the Colorado Liquor Code (Colorado Statutes Annotated (1935), Chapter 89, Section 38(c)), which reads, in part, as follows:

"(c) All alcoholic liquors manufactured in this state, or sold therein, shall bear on the said container or containers, an excise stamp to be provided by the State Licensing Authority. . . . and all alcoholic liquors imported into the state immediately upon entry therein, be affixed with the said excise stamp before being sold or offered for sale within the said state, and in accordance with the rules and regulations which may be promulgated by the State Licensing Authority . . . ."

The relevant provisions of Regulation 1 are as follows:

"3. All malt, vinous and spirituous liquors sold or transferred within the State of Colorado must be affixed with the proper stamps before sale or transfer. Manufacturers, rectifiers and the first licensee receiving liquor within the State are primarily liable for the excise tax. . . . Wholesalers shall affix the proper stamps upon all liquors sold by them within this State to retailers or consumers prior to delivery. . . ."

"4. Only Colorado licensed manufacturers, rectifiers and wholesalers shall be permitted to purchase excise tax stamps from the State Treasurer. . . ."

Regulation No. 12 C is as follows:

"It is hereby required that all alcoholic liquors and fermented malt beverages shall be the sole and exclusive property of and subject to the unrestricted power of disposal of a duly licensed Colorado wholesale liquor dealer as defined in Section 17 of Chapter 142 of Section 5(2) of Chapter 82, Session Laws of Colorado of 1935 at the time such liquors and malt beverages cross the Colorado State line and are imported into this State for the purpose of being sold, offered for sale or used in this State."

become the property of a licensed Colorado wholesaler and come to rest in his warehouse where packages are broken and tax stamps affixed by him. These facts are fundamental to a proper understanding of the narrow and essentially local issue involved in this case.

The Statement in the petition points out that the decision of the Circuit Court of Appeals related only to the second count of the original indictment. Count One of that indictment alleged a conspiracy with respect to wholesale prices but that Count was quashed (R. 15-19, 53-54). In the statement of questions, specification of errors and argument, however, the petition refers to a conspiracy "to blanket \* \* \* the entire wholesale and retail trade" and to "eliminating price competition among wholesalers and retailers." No issue with respect to wholesale prices or the wholesale trade is presented on the present record. Count Two of the indictment relates only to retail prices and the retail trade within the State of Colorado.

The petition states that it is not entirely clear upon what grounds the court below held that the indictment does not sufficiently allege restraint of interstate commerce which the Sherman Act prohibits. If the opinion is read as a whole, we believe that both the grounds for the decision and the nature of the only question presented to this Court become abundantly clear. The Circuit Court of Appeals held only that an agreement, for purposes related solely to local conditions in the retail trade, to subject to price maintenance on retail sales within Colorado alcoholic beverages, which can be purchased by the retailers only after interstate movement has ceased and the beverages have come to rest in the ownership and custody of local wholesalers, is not a restraint of interstate commerce under the Sherman Act solely because such alcoholic beverages once moved in interstate commerce.



### QUESTIONS PRESENTED.

In the light of these additional facts the questions really presented in this case are these:

1. Whether the refusal by local retailers, for purposes related only to local conditions in the retail trade, to purchase from local wholesalers alcoholic beverages which are no longer in interstate commerce restrains interstate commerce and violates the Sherman Act solely because a substantial part of those beverages once moved in interstate commerce.

2. Whether an agreement to subject alcoholic beverages, which can be purchased by Colorado retailers only from Colorado wholesalers after interstate movement has ceased, to agreements to maintain the resale price in local retail sales restrains interstate commerce and violates the Sherman Act solely because a substantial part of those beverages once moved in interstate commerce.

3. Whether an agreement to subject to retail price maintenance the retail trade of a single state in alcoholic beverages, no longer in interstate commerce when acquired by the retailers, restrains interstate commerce and violates the Sherman Act solely because a substantial part of those beverages was once shipped in interstate commerce.

### ARGUMENT.

**The decision of the Lower Court is not in conflict with Applicable decisions of this Court.**

The decision of the lower court is not in conflict with *Fashion Originators' Guild of America, Inc., v. Federal Trade Commission*, 312 U. S. 457, and similar cases.<sup>2</sup> The

<sup>2</sup>The claim of conflict is based on selecting a single sentence from the opinion of the lower court and disregarding the balance of the opinion and the actual decision.

lower court decided that concerted refusal by local retailers, for purposes related wholly to local conditions in the retail trade, to purchase from local wholesalers alcoholic beverages no longer in interstate commerce did not restrain such commerce and violate the Sherman Act solely because a substantial part of those beverages were produced outside the State and had once moved in interstate commerce. That holding is in accord with applicable decisions of this Court. *Industrial Association of San Francisco v. United States*, 268 U. S. 64; *Levering & Garrigues Co. v. Morrin*, 289 U. S. 103.

The cases cited by the Government presented a very different situation. *Fashion Originators' Guild v. Federal Trade Commission*, *supra*, involved a nationwide conspiracy to eliminate from commerce, whether interstate or intrastate, all garments made from copied designs. *Loewe v. Lawlor*, 208 U. S. 274, *Duplex Printing Press Company v. Deering*, 254 U. S. 443 and *Bedford Cut Stone Company v. Journeymen Stone Cutters' Ass'n*, 274 U. S. 37, each involved a boycott in one state (or many states) designed to compel unionization of an industry in another state by suppressing interstate trade in its products. In those cases suppressing interstate commerce was a means deliberately adopted for effecting the ultimate purpose, not merely an incidental result. In this case there was an exclusively local aim, a desire to fix retail liquor prices in Colorado only. Pursuant to that local aim, Colorado retailers refrained from purchasing from Colorado wholesalers liquors not subject to price maintenance contracts. The effect, if any, upon interstate commerce was purely fortuitous and incidental, the result of local activities for local purposes.

The assertion in the petition that in cases of this character a purpose to affect interstate commerce is immate-

rial and no allegation of intent is necessary does not state the law. It is sufficient to point out the different results reached in the first and second *Coronado* cases, *United Mine Workers v. Coronado Coal Company*, 259 U. S. 344 and *Coronado Coal Company v. United Mine Workers*, 268 U. S. 295. Acceptance of the Government's contention in this regard—rejected, incidentally, in *Industrial Association v. United States* and *Levering & Garrigues Co. v. Morrin*, *supra*,—would outlaw under the Sherman Act every form of local action with respect to commodities which have ever moved in interstate commerce, whether the action was directed to a local purpose or had a wider scope. A local temperance society could not agree to refuse to patronize retailers of groceries and drugs who also sold liquor.

The Government is apparently willing to push the argument this far, at least where the local activity affects price competition. (Page 13 of Petition.) The cases upon which it relies (*Local 167 v. United States*, 291 U. S. 293, *Swift and Company v. United States*, 196 U. S. 375, and *California Retail Grocers & Merchants Association, Limited v. United States*, 139 F. (2d) 978), do not support its position. Each of them involved restraints operating in part directly upon interstate commerce. *Local 167 v. United States* showed a series of restraints beginning at the point where commodities were unloaded from the interstate carrier, in part in another state, and affecting its transportation to and sale by wholesalers to retailers. In the *Swift* case, the restraints operated at an intermediate point in interstate commerce. The commodities involved not only had moved in interstate commerce but were in large part destined for further movement in such commerce. These were not cases of activity only with respect to retail sales after goods had finally come to rest within a state. As for *California Retail*

*Grocers & Merchants Association, Limited v. United States*, as the opinion itself points out, "The purpose of the conspiracy was to 'stabilize' the entire trade in California in all sales, whether interstate or intrastate." (139 F. (2d) at 983.)

Nor is the decision of the lower court in conflict with cases in which this Court has condemned illegal systems of resale price maintenance. *United States v. Univis Lens Co.*, 316 U. S. 241, *Dr. Miles Medical Company v. Park & Sons Company*, 220 U. S. 373 and *Ethyl Gasoline Corporation v. United States*, 309 U. S. 436 all involved comprehensive systems of price maintenance initiated by a producer in one state, covering both wholesale and retail transactions, affecting interstate as well as intrastate sales, and extending into every state where the product was marketed. The purpose and necessary effect was to limit the entire market in the product. In this case, on the other hand, price maintenance has been initiated by retailers in a single state and affects only retail prices in local transactions in that state. The controlling decisions are *Seagram-Distillers Corporation v. Old Dearborn Distributing Co.*, 363 Ill. 610, 2 N. E. (2d) 940, and *Joseph Triner Corporation v. McNeil*, 363 Ill. 559, 2 N. E. (2d) 929, affirmed in *Old Dearborn Distributing Co. v. Seagram-Distillers Corp.*, 299 U. S. 183.<sup>3</sup>

The petition states that the court below erroneously relied on cases such as *Walling v. Jacksonville Paper Co.*, 317 U. S. 564, involving a statute confined to acts "in" interstate commerce. That and similar cases were cited by the court below in support of its conclusion that liquor, the

<sup>3</sup> Both cases involved commodities produced outside Illinois and distributed within the state by sales affiliates of the producers. This Court did not even discuss the effect of the price maintenance systems upon interstate commerce.

title to which passes to a licensed Colorado wholesaler at the Colorado State line and which comes to rest in his ownership and custody in his Colorado warehouse for the purpose of having tax stamps affixed and for ultimate disposition to a local retailer is no longer an integral part of interstate commerce. This conclusion is so clearly correct and so plainly supported by the cases cited for it that the Government's claim to the contrary may be properly characterized as frivolous.

**This case does not present questions of general importance but a narrow issue with respect to the construction of one count of a particular indictment in the light of peculiar local legislation.**

The petition urges that the decision of the lower court should be reviewed because it presents important questions concerning the application of the Sherman Act to conspiracies to induce or require producers to sell under price maintenance contracts establishing minimum retail or wholesale prices in purported compliance with state fair trade laws and the Miller-Tydings Act of August 17, 1937, 50 Stat. 693.

The lower court's decision was that the allegations of Count Two of this indictment were insufficient to establish a restraint of interstate commerce in violation of the Sherman Act. Those allegations related wholly to retail prices. They included the allegation that retailers could purchase liquor only from duly licensed Colorado wholesalers. The Count was considered by the court in the light of the Colorado liquor legislation imposing restrictions in aid of local regulation which effectively insulated retail transactions from interstate commerce. It is apparent that the issue involved is not one of general application but turns

upon the peculiar and limited allegations of this indictment and the unusual provisions of the Colorado statutes. No similar question is involved in the three pending cases cited by the Government, or is likely to be involved in any future case not involving liquor legislation substantially the same as that of Colorado.

In fact, not even another Colorado liquor indictment is likely to raise this narrow issue. As already pointed out, Count One of the indictment alleged a conspiracy with respect to wholesale prices but was dismissed when the Government elected to stand on Count Two. The indictment was not, as it might have been, drawn to present in one count the Government's claim of conspiracy with respect to both wholesale and retail prices. That such a conspiracy, giving the participants a definite price spread, is the typical one is shown by the fact that each of the cases cited by the Government presents such a situation. The indictments in *United States v. National Association of Retail Druggists*, No. 683C (Criminal), D. C. N. J., and *United States v. New York State Pharmaceutical Association*, No. C-114-75, S. D. N. Y., each allege in one count a conspiracy with respect to both wholesale and retail prices and the indictment in *United States v. National Wholesale Druggists' Association*, No. 618C (Criminal), D. C. N. J., alleges a conspiracy with respect to wholesale purchasing and selling prices. Each of the indictments also alleges that part of the wholesale sales to which the conspiracy relates were actually interstate sales. The issues presented by those cases may be of general importance. The difficulty is that this case presents not those issues but narrow and local ones.

There is an additional reason why the present case is not one for review for the purpose of settling general ques-



tions of application of the Sherman Act. This case raises special problems of conflict with Colorado's local policy for regulation of the liquor business. Retail sale of liquor in Colorado is completely insulated from interstate commerce to facilitate Colorado's program for supervision of that business. Under the Twenty-first Amendment to the Constitution Colorado can enforce such insulation notwithstanding the commerce clause. Another aspect of Colorado's regulation of the liquor traffic is the encouragement of resale price maintenance in connection with it.<sup>4</sup> The extension of Federal power under the Sherman Act into the field of retail liquor sales in Colorado plainly involves serious repercussions on Colorado's policy of regulation.

We urge that a case, presenting both facts and considerations of local policy peculiar to the liquor business, is not an appropriate one for settlement of general questions of the application of the Sherman Act. This is particularly true when, by reason of a defect in the pleadings, the record does not present all the alleged facts, even with respect to the liquor business, and the narrow issue presented, so far as appears, will never arise again.

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<sup>4</sup> By Section 3 of the Colorado Liquor Code it is made unlawful:

"To wilfully and knowingly advertise or offer for sale or sell any malt liquors, vinous liquors, spirituous liquors and alcoholic beverages whether the person so advertising, offering for sale or selling is or is not a party to such contract, at less than the price stipulated in any contract entered into pursuant to the provisions of the Fair Trade Act, the same being Chapter 146, Session Laws of Colorado, 1937." Session Laws 1941, Ch. 160, Amending Chapter 89, Section 17, Colorado Statutes Annotated (1935).



# CONCLUSION.

The petition for writs of certiorari should be denied.

Respectfully submitted,

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3

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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1944.

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UNITED STATES OF AMERICA, *Petitioner*,

v.

FRANKFORT DISTILLERIES, INC.; NATIONAL DISTILLERS PRODUCTS CORPORATION; BROWN FORMAN DISTILLERS CORPORATION; HIRAM WALKER, INCORPORATED; SCHENLEY DISTILLERS CORPORATION; SEAGRAM DISTILLERS CORPORATION; McKESSEN & ROBBINS, INCORPORATED; J. E. SPEEGLE.

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**BRIEF OPPOSING PETITION FOR WRIT OF CERTIORARI ON BEHALF OF SCHENLEY DISTILLERS CORPORATION.**

---

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MS.

IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1944.

—  
No. 527.  
—

UNITED STATES OF AMERICA, *Petitioner*,

v.

FRANKFORT DISTILLERIES, INC.; NATIONAL DISTILLERS PRODUCTS CORPORATION; BROWN FORMAN DISTILLERS CORPORATION; HIRAM WALKER, INCORPORATED; SCHENLEY DISTILLERS CORPORATION; SEAGRAM DISTILLERS CORPORATION; MCKESSEN & ROBBINS, INCORPORATED; J. E. SPEEGLE.

—  
**BRIEF OPPOSING PETITION FOR WRIT OF CERTIORARI ON BEHALF OF SCHENLEY DISTILLERS CORPORATION.**  
—

Schenley Distillers Corporation, the respondent, submits that the decision below correctly construes the allegations of the indictment and properly applies thereto the applicable laws of Colorado and that no reason exists under the rules for granting the petition for writs of certiorari.<sup>1</sup>

<sup>1</sup> Emphasis ours unless otherwise noted.

## OPINIONS BELOW.

On March 12, 1942, an indictment in two counts was returned in the Colorado district, charging the respondents with an alleged violation of the Sherman Antitrust Act, 15 U. S. C. A. 31, *et seq.* The government elected to stand on Count 2, and Count 1 was quashed. Demurrers were overruled (R. 53). To facilitate review of the law with respect to the sufficiency of the indictment, a stipulation and consent to severance was entered into between the defendants and the United States. Under the terms of this stipulation, certain defendants changed their pleas from not guilty to *nolo contendere*; sentences were imposed upon them and the present separate appeals were filed by said defendants from the judgment of the court below.

The appeals were argued and submitted January 18, 1944 to Judges Phillips, Bratton, and Murrah, of the Tenth Circuit Court of Appeals (R. 101). On February 28, 1944, in a unanimous opinion, the indictment was held insufficient and judgment was entered ordering the cause remanded to the District Court with directions to dismiss the indictment (R. 101). The first opinion of the court is not reported. That opinion was rendered with reference solely to the Colorado indictment now before this court, and we have therefore printed the same as "Appendix F" to this brief. On March 10, 1944, the court, of its own motion, set this cause for reargument, *limited*, however, to the question of whether the second count of the indictment charges the offenses set out with sufficient particularity (R. 104). The reargument was held jointly with the reargument of the indictments returned in Kansas against the Safeway and Kroger Grocery Companies on April 24, 1944 (R. 104-105). The reargument was before the full bench of four judges (Phillips, Bratton, Huxman and Murrah).

On August 26, 1944, a second opinion was rendered which was substituted for the first opinion printed herewith as "Appendix F". The second opinion deals jointly with the

Colorado indictment involved herein against the distillers, et al, and the Kansas indictments against Safeway and Kroger Grocery Companies. A large part of this opinion is not relevant to any question presented by the petition for writs of certiorari, but in the concluding portion of the opinion, commencing with the second paragraph on page 115 of the record, the court discusses the insufficiency of the Colorado indictment in view of the distinctive laws of the State of Colorado and reaches the unanimous conclusion that in view of such laws, the indictment fails to set forth a federal misdemeanor within the scope of the anti-trust laws.

In this respect, the four judges, upon reargument, came to the same conclusion arrived at by the three judges originally. Thus the court was unanimous in all respects upon the questions presented by the petition for writs of certiorari. The dissenting opinions of Judge Phillips and Judge Vaught (R. 119, R. 122), relate solely to the Kansas indictments against the Safeway and Kroger Grocery Companies which were upheld. The questions involved in the grocery indictments are entirely disassociated from the questions presented by the government's petition for writs of certiorari as to the Colorado indictments.

### **QUESTIONS PRESENTED.**

We respectfully submit that the questions set forth in the petition for writs of certiorari are too broadly stated and that such questions are not presented by the Colorado indictment. The Circuit Court of Appeals did not find such questions necessary to its decision, and we submit that the same are not appropriately presented for review here upon the present record. We further submit that the questions involved in the present case are local and arise under the distinctive laws of Colorado relating to domestic sales of intoxicating liquors within state limits. The indictments, although of concern to the particular defendants, present no question of general interest and no other similar cases are pending.

Our reasons for stating that the questions set forth in the brief of the Government (p. 2) are not presented by the record in this cause are apparent from an examination of the indictment and the construction thereof by the court below. The brief sets forth three questions. In none of the three questions presented is the court advised that the "commodity" involved is intoxicating liquor. However, that fact considerably changes the questions presented because under the Twenty-first Amendment to the Federal Constitution, the Wilson Act,<sup>2</sup> the Webb-Kenyon Act<sup>3</sup> and the Collier Act<sup>4</sup> (which re-enacted the Webb-Kenyon Act<sup>3</sup>) the several states of the Union are permitted to exercise exclusive jurisdiction over purely intra-state traffic in intoxicating liquors and are granted a much greater control "over interstate liquor traffic than over commerce in any other community."<sup>5</sup>

The Federal Government has jurisdiction under the revenue laws and under the Federal Alcohol Administration Act, over the manufacture, labeling and interstate transportation of intoxicating liquors,<sup>6</sup> but broad considerations of national and state policy have combined to permit exclusive local state regulation of retail sales and consumption.

Further, the questions as presented omit to state that under the distinctive laws of the State of Colorado all interstate transportation and commerce in intoxicating liquors necessarily ceased and forever ended when the liquor crossed the state line and came to rest in the warehouse of a Colorado licensed wholesaler. Title thereupon

<sup>2</sup> 26 Stat. 313 (1890); 27 U. S. C. A. § 121.

<sup>3</sup> 37 Stat. 699 (1913); 27 U. S. C. A. § 122.

<sup>4</sup> 49 Stat. 877 (1935); 27 U. S. C. A. § 122.

<sup>5</sup> *Duckworth v. Arkansas*, 314 U. S. 390 (1941).

<sup>6</sup> *Ziffrin, Inc. v. Reeves*, 308 U. S. 132 (1939), pp. 138-139; *State Board of Equalization of California v. Young's Market Co.*, 299 U. S. 59 (1936), p. 63; *In Re Rahrer*, 140 U. S. 545 (1891), p. 560; *Pabst Brewing Company v. Crenshaw*, 198 U. S. 17 (1905), p. 27; *Premier-Pabst Sales Co. v. McNutt*, 17 F. Supp. 708 (D. C. Ind. 1935) 708

passed to such wholesale dealer. Thereafter, the liquors were commingled with all other similar property in the state and could not under the laws of Colorado be sold or shipped out of the state. Such intoxicating liquor could only be sold to a Colorado licensed retail dealer and by him to a Colorado consumer.<sup>7</sup> *The conspiracy alleged in the indictment related only to the retail sale by the duly licensed Colorado retailer, under Colorado laws, to a Colorado consumer, in accordance with the policy of the State of Colorado. And it related only to the percentage of the retail mark-up in accordance with the Colorado Fair Trade Law and the Colorado Unfair Practice Act after all interstate commerce had, as a matter of law and fact forever ended.*

Nor do the questions as presented in the petition for writs of certiorari advise the court that the commodity involved, to-wit, intoxicating liquor, was a commodity which bore the trademark, brand and name of the producer and that such branded merchandise was in open competition with branded merchandise of the same general class produced and distributed by others.

The second question as presented refers to an alleged conspiracy to subject a commodity in interstate commerce "to agreements to maintain the resale price on *intra-state* sales of the commodity" without stating that such agreements to maintain the resale price were *Fair Trade contracts made in accordance with and under the statute law and public policy of the State of Colorado in which such resale was alleged to have been made and to which the commodity was transported*. Such agreements are specifically exempted from the Sherman Anti-trust Act by the Miller-Tydings Amendment.

The third question as set forth makes similar omissions and fails to state that the so-called "price fixing agreements" were the very Fair Trade agreements authorized

<sup>7</sup> Colorado Liquor Rules and Regulations (1937) Regulation 12 C.

and encouraged by the statute law and policy of the State of Colorado. In like manner, the first question as presented does not state that it has to do with the efforts of the retailers to maintain and enforce the "fair trading" of the commodities involved in accordance with the laws and policy of the State of Colorado.

When these omissions are supplied the entire character of the questions presented by the indictment is changed. When we know (1) that the commodity involved is intoxicating liquor (2) that only the retail sale thereof by a Colorado licensed retailer to a Colorado consumer is involved (3) that only the percentage of mark-up on the retail price was involved, long after interstate commerce had ended, (4) that a mark-up was legally compelled by the Colorado "Unfair Practices Act"<sup>8</sup> and was embodied in the fair trade contracts authorized by the Colorado "Fair Trade Law"<sup>9</sup> and by the "Liquor Code"<sup>10</sup> of Colorado, it then becomes clear that the questions involved in this case are not federal questions and are outside the jurisdiction of the federal government under the Sherman Anti-trust Act.

It can hardly be claimed that questions concerning the efficacy and wisdom of the Unfair Practice Act of the State of Colorado, which requires certain fixed elements to be taken into consideration in determining the retailer's mark-up and which forbids destructive price cutting, are federal questions. Nor can it be successfully claimed that questions concerning the wisdom of the policy of Colorado in providing for Fair Trade contracts under the Colorado Fair Trade Law, and in making the price thereunder uniform for such item throughout the state and in prohibiting the cutting of that price by drastic criminal penalties under appropriate provisions of the Liquor Code, are federal questions.

<sup>8</sup> Colorado Session Laws (1937), Chapt. 261.

<sup>9</sup> Colorado Session Laws (1937), Chapt. 146.

<sup>10</sup> '35 C. S. A. c. 89.



Nowhere in the statement of the questions presented, in the accompanying argument or in the indictment is it alleged that the agreements fixing the retailer's resale price have in anywise obstructed or impeded interstate commerce. *It is not claimed that the quantity or quality of intoxicating liquor shipped into the State of Colorado has been in anywise diminished.* While it is argued that the "necessary consequences" thereof must be to reduce consumption, that fact is not alleged and the argument disproves itself. One of the soundest economic reasons for authorizing and encouraging Fair Trade contracts is to *maintain sales and prevent destructive competition which disrupts consumer markets and in the end results in destroying commerce.* Hence, it must be presumed that the experience of the State of Colorado has convinced the people thereof that the maintenance of fixed and uniform prices for each of the several competitive brands of intoxicating liquors sold in that state *increases the quality and promotes consumer confidence and increases sales.* Therefore, insofar as the present indictment is concerned, there is no allegation and no sound argument to show that the acts complained of had any adverse effect upon interstate commerce in intoxicating liquors.

**THE QUESTIONS PRESENTED RELATE EXCLUSIVELY TO INTRA-STATE COMMERCE GOVERNED BY THE LAWS OF COLORADO.**

The Circuit Court of Appeals was unanimous in its conclusion that Count 2 of the indictment related exclusively to intrastate commerce which was within the exclusive jurisdiction of Colorado, and that Colorado had adopted specific laws occupying the field involved. In so holding the court said (R. 116):

"But a combination or concert limited in its objectives to intrastate activities, with no intent or purpose to effect interstate commerce, is without the reach of the

Act, even though there may be an indirect and insubstantial effect on interstate commerce."<sup>11</sup>

"Colorado has a Fair Trade Act, chapter 146, Laws of 1937; an Unfair Practices Act, chapter 261, Laws of 1937; and a Liquor Code, sections 15-47, chapter 89, Colorado Statutes Annotated 1935."

The court then analyzes the above acts and points out that under the Colorado Fair Trade Act it is lawful to provide by contract for the sale or resale of a commodity bearing the trademark, brand or name of the producer, at a fixed minimum price and unlawful to resell at less than the minimum prices stipulated by the seller. Necessarily such contracts result in a uniform retail price for the same brand at all retail outlets, but the brands of one distiller or producer are in open competition with the brands of all other distillers or producers. The fact that each distributor of branded merchandise stipulated with the retail dealer for a fair trade price for his particular brand did not result in a uniform price for all brands—on the contrary, it resulted in competitive prices for all brands. The indictment does not allege that there was any *uniform* price. The indictment does not allege any lack of competition between distillers and producers in the sales of their merchandise to wholesale dealers in Colorado. No such allegation could truthfully be made in view of the well known fact that the most intense competition existed between the various distillers and producers of intoxicating liquors. After the goods came to rest in Colorado the wholesalers sold the same to retailers who in turn added the retail mark-up to the invoice price before selling the same to the consumer. It is alleged that this retail mark-up was fixed by Fair Trade contracts. The fact that such Fair Trade contracts established a uniform price for the sale of the

<sup>11</sup> Citing *United Mine Workers v. Coronado Coal Co.*, 259 U. S. 344; *United Leather Workers v. Herkert*, 265 U. S. 457; *Industrial Assn. v. United States*, 268 U. S. 64; *Levering & Garriques Co. v. Morrin*, 289 U. S. 103.

same brand at retail throughout the state was not in restraint of trade or competition but was in accord with the very purpose and intent as well as the express language of the uniform Fair Trade Act adopted by Colorado and by a great majority of the states of the Union. While such contracts established a uniform price for the sale of the same brand in different retail stores the result of adding the retail mark-up to the wholesale prices of the various brands of merchandise which were sold at different and competitive prices by wholesalers to retailers *was to increase the margin of difference in such prices, which emphasized the competition between brands.*

The court further analyzed Section 3 of the Unfair Practices Act, pointing out that such act makes it unlawful for anyone to sell, give or advertise any product for less than the cost thereof to the vendor, donor or advertiser with intent to injure or destroy competition. "Cost" is further defined to include in addition to the invoice cost the cost of doing business or overhead expenses, which "must include without limitation the following items of expense: labor (including salaries of executives and officers), rent, interest on borrowed capital, depreciation, selling cost, maintenance of equipment, delivery cost, credit losses, all types of licenses, taxes, insurance and advertising" (Unfair Practices Act, Sec. 3(b)). Since the elements of cost are more or less standardized the Colorado Law requires a reasonably uniform percentage of mark-up.

The court further points out that Section 17 of the Liquor Code as amended by Chapter 160, Laws of 1941, makes it unlawful to advertise or sell vinous liquors, spirituous liquors and alcoholic beverages at less than the price stipulated in any contract entered into pursuant to the provisions of the Fair Trade Act, and also authorizes the licensing authority to make rules and regulations pursuant to the licensing provisions. Regulation 1 (3) promulgated under the Liquor Code provides that all spirituous liquor sold or

transferred within the state must be affixed with the proper stamps before sale or transfer, and wholesalers shall affix the stamps on all liquor sold by them within the state to retailers or consumers prior to delivery. Regulation 12 C provides that all alcoholic liquor shall be the sole and exclusive property of and subject to the unrestricted power of disposal of a duly licensed Colorado wholesale dealer, "at the time such liquor crosses the state line coming into the state for the purpose of being sold or used there."

The court then continues (R. 117):

"These statutes and regulations are emphasized as constituting legal warrant for the fair trade agreements referred to in the indictment. And, justifying his appearance in the case by reference to the observation of the court in *Washington Brewers Institute v. United States*, *supra*, that the failure of any state to appear as a friend of the court to protest the enforcement of the Sherman Act, was significant, the attorney general of Colorado filed in this cause a brief as amicus curiae, calling attention to these statutes and regulations and contending that the fair trade contracts described in the indictment were entered into under the Fair Trade Act and the Liquor Code, that they are removed from the regulation and control of the United States, and that they are subject exclusively to the control and operation of the law of Colorado.

"The agreement as pleaded in the indictment in this case was essentially one to fix and maintain prices at which alcoholic beverages shall be sold at retail in Colorado. Under regulation 12 C, *supra*, it is impossible for a retailer in that state to buy liquor from a producer. He can purchase it only from a wholesaler licensed under the laws of the state. Before liquor produced in other states can be acquired from the wholesaler title vests in the wholesaler at the time it crosses the state line coming into the state, and the required stamps must be affixed by the wholesaler. When it comes to rest in the ownership and custody of the wholesaler, is placed in the warehouse of the wholesaler for local disposition to the retailer, and is com-

mingled with other merchandise, it ceases to be an integral part of interstate commerce.<sup>12</sup> \* \* \*

And sales subsequently made by the wholesaler to retailers and in turn by retailers to the consuming public are wholly intrastate transactions. \* \* \*

\* \* \* \* \*

But here it is not charged that the parties agreed and conspired to fix and maintain prices at which producers or others outside Colorado should sell their products to wholesalers within the state. Neither is it charged that it was a part of the agreement that producers should establish uniform prices from all producers and distillers to all wholesalers in Colorado of certain types, ages, or qualities of liquor moving in interstate commerce. No charge of that kind direct or by fair inferences is to be found in the indictment."

Finally, the court discusses the allegations that retailers agreed to patronize only producers and wholesalers who entered into fair trade contracts and to boycott producers and wholesalers who supplied their products to retailers who violated the laws of Colorado by refusing to observe the prices set forth in such fair trade contracts, and said:

"But the words 'patronize' and 'patronage' as used clearly refer to the purchase of beverages from producers and wholesalers. And it is perfectly obvious that these allegations are completely innocuous and ineffective in charging an offense under the Sherman Act for the reason that retailers in Colorado cannot purchase from producers, and sales from wholesalers to retailers in that state are exclusively intrastate transactions.

The second count is completely barren of any allegations of fact effectively charging that the combination

<sup>12</sup> Citing *Industrial Ass'n. v. United States*, *supra*; *Walling v. Jacksonville Paper Co.*, 317 U. S. 564; *Higgins v. Carr Bros. Co.*, 317 U. S. 572; *Jewel Tea Co. v. Williams*, 118 F. (2d) 202; *Jac Beer Co. v. Redfern*, 124 F. (2d) 172; *Walling v. Goldblatt Bros.*, 128 F. (2d) 778; *Allesandra v. C. F. Smith Co.*, 136 F. (2d) 75.

and agreement was one directly and substantially to restrict or burden the free and untrammelled flow of interstate commerce. The combination as pleaded was one necessarily intended to affect only intrastate activities. Its sole objective was control of domestic enterprise within the state, and it spent its direct and substantial force upon intrastate activities. Its effect, if any, on interstate commerce was indirect, insubstantial, and incidental. A combination of that kind lies beyond the reach of the Sherman Act."

### **THE CIRCUIT COURT OF APPEALS CORRECTLY APPLIED THE LAWS OF COLORADO.**

The laws of Colorado which govern and regulate the sales of liquor in that state are:

Article XXII of the Colorado Constitution, repealing the intoxicating liquor laws;<sup>13</sup>

Article XXIV, Sec. 2 (b) of the Colorado Constitution, allocating 85% of the net revenue from liquor to the State Old Age Pension Fund;<sup>14</sup>

Chapter 89 of the Colorado Statutes Annotated, 1935, being the Colorado Liquor Code;<sup>15</sup>

Chapter 146, Session Laws of Colorado, 1937, being the Colorado Fair Trade Act;<sup>16</sup>

Chapter 261, Session Laws of Colorado, 1937, being the Colorado Unfair Practices Law;<sup>17</sup>

Chapter 160, Session Laws of Colorado, 1941, being the application of the Fair Trade Acts to the Colorado Liquor Code.<sup>18</sup>

When Article XXII of the Colorado Constitution, repealing state prohibition, was adopted by the people on November 8, 1932 it was necessary for the state to enact a new code of liquor laws which was enacted the following year

<sup>13</sup> See Appendix A, p. 22.

<sup>14</sup> See Appendix B, p. 22.

<sup>15</sup> See Appendix C, p. 22.

<sup>16</sup> See Appendix D, p. 25.

<sup>17</sup> See Appendix E, p. 27.

<sup>18</sup> Liquor Code §3 (t).

and is Chapter 89, Colorado Statutes Annotated, 1935. This code sets up complete machinery for licensing and regulating the sale, use and consumption of liquors, wines and beer, both wholesale and retail, within the State of Colorado and also levies an excise tax thereon evidenced by liquor stamps which can only be sold to a manufacturer or a wholesaler. The code makes the wholesaler liable for payment of the tax in the first instance and it is unlawful for them to sell liquor for retail sale without first affixing the stamp to the container. The stamp must remain uncanceled. The cancellation must be done by the retailer dealer immediately upon receipt of the article. Thus, it is through control of the sale of liquor by the wholesaler that the state is able to enforce its police regulations and to collect its current excise revenue. In the court below the Attorney General of Colorado intervened as *amicus curiae*, and called the court's attention

"to the fact that in Colorado, liquor sales constitute one of the chief sources of revenue, ear-marked for the benefit of our old age pensioners and that the system in Colorado providing for the collection of that revenue is built up around an absolute control by the state over manufacturers (brewers and distillers) and wholesale importers. In other words, so far as the instant cases are concerned, practically all spirituous liquors sold in Colorado are imported by wholesalers. The state looks to and holds the wholesaler accountable for the payment of the state excise taxes thereon. Colorado, therefore, has a direct interest insofar as its police regulations and state revenue are concerned in the sale of liquor within its borders, which is all embracing and of necessity includes *both the wholesale and retail price thereof.*"

The Attorney General further pointed out in his printed brief in the court below (p. 4) that:

"In addition to the Liquor Code, the State Legislature in 1937, enacted two statutes designed to *stabilize retail prices* on commodities throughout the State and



to protect the retail trade from unscrupulous and *destructive price cutting practices.*"

He referred to the Fair Trade Law and the Colorado Unfair Practices Law and then continued:

"As heretofore pointed out these Acts were deliberately designed to fix and stabilize minimum retail prices of commodities within the State of Colorado. We assume that the right of the State of Colorado to enact the same, as well as the fact that prices so fixed upon commodities in intrastate business, are excluded from the operation of the Sherman Act, has been too well established to require further argument."

The Attorney General then quoted the amendment to the Liquor Code, passed by the Colorado Legislature in 1941 [Sec. 17, Chapter 89, 1935, Subsection (t)] making it a criminal offense to sell, offer for sale, or advertise intoxicating liquor "at less than the price stipulated in any contract entered into pursuant to the provisions of the Fair Trade Act . . ." The Attorney General then said:

"The 1941 amendment, *supra*, was enacted so as to clarify any doubt but that retail liquor sales in the State of Colorado could lawfully be made the subject of fair trades contract for minimum price and thus bring the retail liquor dealers within the provisions of the Fair Trade Act, the same as the druggist or other retail merchant handling and dispensing imported standard branded products.

"We have detailed these state laws, as hereinabove set forth, in order to demonstrate how completely the legislative field in that direction has been occupied by State legislation and accordingly we submit that having so occupied the field, the State has assumed complete and exclusive jurisdiction thereof." Citing *W. J. Meredith et al. v. City of Winter Haven*, 320 U. S. 228, 64 S. Ct. 7, 88 L. Ed. 1 (1943).

In conclusion, the Attorney General pointed out the evil result which would necessarily flow if the Federal Anti-

Trust Division attempted to regulate the *retail pricing* and *sales of intoxicating liquor in Colorado under Federal anti-trust laws*. He said:

"In conclusion, therefore, let us say that if the appellants acting under the authority of Colorado law have made contracts legal and binding within the State of Colorado (*as appears to be the recorded fact in these appeals*), and they now, because of their observance of such contracts, are guilty of violating the Sherman Anti-Trust Law, *the Colorado Fair Trade Practices Act is nullified and the state's control and regulation of its intra-state liquor traffic is crippled, if not destroyed*.

"Furthermore, anything which tends to lower liquor sales in Colorado will directly affect the State Excise Revenue derived therefrom and if the sale of liquor within Colorado is to be thrown open to unrestricted and uncontrolled wholesale competition, its *legitimate revenues must decrease* and the ground is tilled and fertilized from which the bootlegger and his illicit brew must inevitably spring.

"We submit, therefore, that sales contracts made by virtue of our Colorado laws are exclusively under the control of the State of Colorado, and, so far as the contracts themselves are concerned, they have been removed from federal regulation and control."

The brief of the Government<sup>19</sup> alleges that it is "immaterial that *the indictment in the present case does not allege a purpose to destroy or injure the interstate trade*" involved. The argument is that the alleged refusal to purchase goods which are not protected by Fair Trade contracts must have the necessary effect of restraining interstate trade and depriving producers of a market. No such inference as to such consequence can arise in view of the settled policy of forty-five states of the Union, which have passed Fair Trade Laws and of the National Government in recognizing the validity of such policy and laws in the Miller-Tydings Amendment to the Sherman Anti-Trust

<sup>19</sup> p. 10.

Law. These laws recognize that unrestrained price cutting is injurious to the manufacturer, distributor, retailer and general public. This is especially true as to liquor where price wars for a time stimulate excessive use of intoxicants with all the social problems resultant therefrom and finally result in destroying the commerce and the market for such goods. Colorado recognized that fact by providing criminal penalties of a fine up to \$5000.00 or imprisonment up to one year, or both, for violation of Fair Trade contracts in sales of alcoholic beverages. New Mexico, Kentucky, Arizona, Arkansas, California, Florida, and Georgia have expressed the same policy by providing that whereas other trademarked commodities *may* be covered by Fair Trade contracts, liquor *must be sold only under Fair Trade contracts*.<sup>20</sup> Other states such as Rhode Island, Indiana, New Jersey, and Kentucky, regulate the retail markup and even fix it. See *Reeves v. Simons*, 289 Ky. 793, 160 S. W. (2d) 149 (1942), from which we quote:

"The proof shows that due to price cutting and to cut-throat competition by producers, wholesalers and **retailers**, chaos existed in the trade which resulted in law violations, excessive use of intoxicants and other conditions detrimental to the commonweal. The *evidence* is to the effect that the fixing of minimum prices has had a stabilizing effect upon the industry, done away with ruinous competition, resulted in less consumption of intoxicants by the public and has caused liquor to be sold in more wholesome surroundings." . . .

. . . regulations which would be called discriminatory, arbitrary and unreasonable if applied to any other business have been upheld by the courts as a

<sup>20</sup> New Mexico Laws of 1939, Chapter 236;  
Kentucky Statutes 2554e-1 to 12;  
Arizona Liquor Control Act, Regulation 41;  
Arkansas Laws of 1939, Act 352;  
California Alcoholic Beverage Control Act, Section 55.5;  
Florida Laws 1941, Chapter 21001;  
Georgia Revenue Tax Act to Legalize and Control Alcoholic Beverages and Liquor.

reasonable exercise of the police power in restricting the liquor traffic."

We submit that the settled national policy expressed in the Twenty-first Amendment to the Constitution, as well as in the Wilson Act and the Webb-Kenyon Act, is to leave regulation of the distribution, sale and use of intoxicating liquor within a state to the exclusive jurisdiction of that state, particularly after all interstate traffic therein has finally ended. This is certainly true in the State of Colorado, which has enacted legislation completely occupying the field and regulating the distribution, wholesaling, retailing, selling and pricing of intoxicating liquor from the moment it crosses the state line and becomes domestic property in the hands of a Colorado licensed wholesaler within the state. The Circuit Court of Appeals was clearly correct in leaving the matters complained of to be dealt with by the State of Colorado and in holding that no Federal question was presented.

### **THE MILLER-TYDINGS AMENDMENT.**

The Miller-Tydings Amendment<sup>21</sup> provides that Section 1 of the Sherman Act shall not apply or render illegal contracts or agreements which fix minimum resale prices of **trade-marked or branded commodities**, such as intoxicating liquor, when such contracts or agreements are lawful as applied to intra-state transactions under state laws or state public policy. An exception is made as to any contract between manufacturers, producers, wholesalers, brokers, factors, or retailers in competition with each other to fix minimum resale prices. The indictment in the present case does not allege any contract or agreement of any kind between producers or distillers. Admittedly each producer sold the liquor manufactured by him to wholesale dealers in Colorado in open unrestricted competition with other producers. Thereafter, when the Colorado licensed whole-

<sup>21</sup> Act of August 17, 1937, 50 Stat. 693, 15 U. S. C. A. § 1.

saler resold to the Colorado licensed retailer in Colorado such sale was subject to a Fair Trade contract. The charge that the prices established by such Fair Trade contract were arbitrary or high, is a matter of opinion and has no relevancy to any of the questions presented. The charge in the indictment that *all* the defendants entered into Fair Trade contracts is consistent with the legally permitted vertical contract from producer to wholesaler and wholesaler to retailer. It does not suggest or allege any horizontal agreements "between producers" or "between wholesalers" or "between retailers."

It is similar to a statement that *all* baseball clubs entered into salary contracts with their ball players. This is a short way of saying that the Yankees entered into such contracts with the players on their club; that the Dodgers entered into such contracts with the players on their club, etc. It cannot be tortured into a claim that the statement charges a combination between all baseball clubs to make the same price or salary contract with each ball player.

The allegation contained in the indictment that the Fair Trade agreements were not made or carried out as "contemplated" by the Miller-Tydings Amendment is a meaningless conclusion, as nowhere are there any allegations of facts showing that these Fair Trade agreements came within in the exceptions to the amendment.

Since the Fair Trade contracts in question are *affirmatively authorized by the laws of Colorado* and therefore are within the Miller-Tydings exception to the Sherman Act, an additional reason is presented showing that the instant case presents no question under the Federal Anti-Trust Laws.

## INTERSTATE COMMERCE NOT INVOLVED.

Admittedly the indictment does not charge any intent to restrain interstate commerce.<sup>22</sup> While the indictment speaks of a "continuous flow", that is a mere conclusion which can have no application to the facts alleged in the present case. In the case at bar Colorado was not a "throat" or "sluice" *through* which goods *moved* in interstate commerce. Colorado was a *dead end*. As a matter of both Federal law and state law, when intoxicating liquor crossed the state line and came to rest in the warehouse of a Colorado licensed wholesaler, its interstate journey was ended for all time. Thereafter the liquor could only be sold or used within the State as provided by State Law. This is admitted. It is also admitted that the only objective of the agreement referred to in the second count of the indictment was the price mark-up on the retail sale. Any agreement to fix the retail mark-up on the retail sale was exclusively a state matter. If it had any effect on interstate commerce, none is shown in the indictment. It is not alleged or claimed that the quantity or quality of liquor shipped into Colorado was diminished or impaired. If there was any incidental effect on interstate commerce it was necessarily indirect and remote and was not within the reach of the Sherman Act. In *Schechter Corp. v. United States*,<sup>23</sup> 295 U. S. 495, at 547 (1935), Chief Justice Hughes said:

"The distinction between direct and indirect effect has been clearly recognized in the application of the

<sup>22</sup> Government Brief, p. 10.

<sup>23</sup> In accord:

*Anderson v. United States*, 171 U. S. 604, 615 (1898);  
*United States v. Patten*, 226 U. S. 525, 542 (1913);  
*Konecky v. Jewish Press*, 288 F. 179, 181 (C. C. A. 8, 1923);  
*C. E. Stevens Co. v. Foster & Kleiser Co.*, 109 F. (2d) 764,  
 768 (C. C. A. 9, 1940);  
*Higgins v. Carr Bros. Co.*, — Me. —, 25 A. (2d) 214  
 (1942); affirmed in 317 U. S. 572 (1943);  
*Walling v. Jacksonville Paper Co.*, 317 U. S. 564 (1943);  
*Ewing-Von Allmen Dairy Co., Inc. v. C. and C. Ice Cream  
 Co., Inc.*, 109 F. (2d) 898 (C. C. A. 6, 1940).

Antitrust Act. Where a combination or conspiracy is formed with the intent to restrain interstate commerce or to monopolize any part of it, the violation of the statute is clear. *Coronado Coal Co. v. United Mine Workers*, 268 U. S. 295, 310. But where that intent is absent, and the objectives are limited to intrastate activities, the fact that there may be an indirect effect upon interstate commerce does not subject the parties to the federal statutes, notwithstanding its broad provisions."

In this connection it should be noted that Fair Trade Laws were enacted *before* adoption of the Miller-Tydings Amendment to the Sherman Act. In several cases when efforts were made by manufacturers or wholesalers to enforce the minimum prices provided in such contracts the defense was raised that the "*fixation of prices*" under a Fair Trade Contract affected interstate commerce and hence violated the Sherman Act. However, it was uniformly held that since the prices "fixed" related to purely intrastate sales either from wholesaler to retailer or from retailer to consumer, there was no such direct effect upon interstate commerce as to bring the same within the reach of the Sherman Act.<sup>24</sup> The subsequent enactment of the Miller-Tydings Amendment was intended to exempt from the Sherman Act the making of fair trade contracts by producers or manufacturers of goods moving in interstate commerce as well as intrastate contracts.

Regardless of the character of the commodity involved, under the allegations of the indictment no direct or substantial effect on interstate commerce appears. The fact

<sup>24</sup> *Seagram Distillers Corporation v. Old Dearborn Distributing Co.*, 363 Ill. 610, 2 N. E. (2d) 940 (1936), affirmed in *Old Dearborn Distributing Co. v. Seagram Distillers Corp.*, 299 U. S. 183 (1936);

*Joseph Triner Corporation v. McNeil*, 363 Ill. 559, 2 N. E. (2d) 929 (1936), affirmed in 299 U. S. 183 (1936);

*Max Factor & Co. v. Kunsman*, 5 Cal. (2d) 446, 55 P. (2d) 177, 187 (1936), affirmed in 299 U. S. 198 (1936);

*Weco Products Co. v. Reed Drug Co.*, 225 Wis. 474, 274 N. W. 426 (1937).



that the commodity involved is intoxicating liquor emphasizes the point that the matters involved are purely within the province of the state and do not present a federal question.

### CONCLUSION.

There is no similar situation. Examination of the issues in the cases pending in the District Courts of New Jersey and New York referred to on Page 14 of the Government's petition, clearly indicate that the facts and the laws in such cases are entirely different from those of the instant case.

In view of the fact that the case at bar deals with the distinctive laws of Colorado which were applied by the Circuit Court of Appeals in accordance with the interpretation of such laws by the proper legal authority of the state, we respectfully submit that the petition for writs of certiorari should be denied. We further submit that no federal questions are involved. There is no conflict with a decision of any other circuit. The court below properly applied the decisions of this court. The issues do not involve other defendants in other cases. We therefore submit that no reason is shown why a further review should be granted and request that the petition for writs of certiorari be denied.

Respectfully submitted,

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*Distillers Corporation.*

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**APPENDIX A.****COLORADO CONSTITUTION****ARTICLE XXII**

"On the 30th day of June, 1933 all statutory laws of the State of Colorado heretofore enacted concerning or relating to intoxicating liquors shall become void and of no effect; and from and after July 1, 1933 manufacture, sale and distribution of all intoxicating liquors, wholly within the State of Colorado, shall, subject to the Constitution and laws of the United States, be performed exclusively by or through such agencies and under such regulations as may hereafter be provided by statutory laws of the State of Colorado; but no such laws shall ever authorize the establishment or maintenance of any saloon."

**APPENDIX B.****COLORADO CONSTITUTION****ARTICLE XXIV**

"Sec. 2 (b) Beginning January 1, 1937, eighty-five per cent of all net revenue accrued or accruing, received or receivable from taxes of whatever kind upon all malt, vinous, or spirituous liquor, both intoxicating and non-intoxicating, and license fees connected therewith."

**APPENDIX C.**

"AN ACT CONCERNING THE MANUFACTURE AND SALE OF ALCOHOLIC LIQUORS AND REPEALING CHAPTERS 5, 11, AND 12, FIRST EXTRAORDINARY SESSION LAWS OF COLORADO, 1933, AND ALL ACTS AND PARTS OF ACTS IN CONFLICT HEREWITH.

*Be it Enacted by the General Assembly of the State of Colorado:*

SECTION 1. This Act shall be deemed an exercise of the police powers of the State for the protection of the economic and social welfare, the health and peace and morals

of the people of this State, but no provisions of this law shall ever be construed so as to authorize the establishment or maintenance of any saloon.

SECTION 2. On and after the effective date of this Act, it shall be lawful to manufacture and sell for beverage or medicinal purposes malt, vinous or spirituous liquors, subject to the terms, conditions, limitations and restrictions contained in this Act.

SECTION 3. It shall be unlawful for any person:

(a) To manufacture, sell or possess for sale any malt, vinous or spirituous liquors, excepting in compliance with this Act.

(t) To wilfully and knowingly advertise or offer for sale or sell any malt liquors, vinous liquors, spirituous liquors and alcoholic beverages whether the person so advertising, offering for sale or selling is or is not a party to such contract, at less than the price stipulated in any contract entered into pursuant to the provisions of the Fair Trade Act, the same being Chapter 146, Session Laws of Colorado, 1937. (Sub-sec. (t), Ref. Ch. 160, S. L. C. 1941.)

SECTION 4. Definitions—as used in this Act.

SECTION 23. Excise Tax. (a) An excise tax of three cents (3c) per gallon or fraction thereof on all malt liquors, three cents per quart or fraction thereof on all vinous liquors containing 14% or less of alcohol, and six cents per quart or fraction thereof on all vinous liquors containing more than 14% of alcohol by volume, and twenty cents per pint or fraction thereof on all spirituous liquors is hereby imposed, and shall be collected on all such respective liquor sold, offered for sale, or used in this State; provided, that upon the same liquors only one such tax shall be paid in this State. The manufacturer thereof, or the first licensee receiving alcoholic liquors in this State, if shipped from without the State, shall be primarily liable for such tax; provided, further, that if such liquor shall be transported by a manufacturer or wholesaler to a point or points outside of the State, and there disposed of, then in such event

such manufacturer or wholesaler, upon the filing with the State Licensing Authority of a duplicate bill of lading or affidavit showing such transaction, the tax provided herein shall not apply to such liquor, and if already paid, shall be refunded to the manufacturer or wholesaler.

(c) All alcoholic liquors manufactured in this State, or sold therein, shall bear on the said container or containers, an excise stamp to be provided by the State Licensing Authority, which said stamp shall be affixed to all alcoholic liquors manufactured within this State by the manufacturer thereof before sale, or before being offered for sale, and all alcoholic liquors imported into the State immediately, upon entry therein, be affixed with the said excise stamp before being sold or offered for sale within the said State, and in accordance with the rules and regulations which may be promulgated by the State Licensing Authority, and provided also that all alcoholic liquors within the State, on the effective date of this Act, shall within a reasonable time thereafter, bear an excise stamp in the proper amount as provided herein.

SECTION 25. Violations and Penalty. Any person violating any of the provisions of this Act, or any of the rules and regulations authorized and adopted under it shall be deemed guilty of a misdemeanor and upon conviction shall be fined in the sum of not more than Five Thousand Dollars (\$5,000.00) for each offense, or may be punished by confinement in the county jail for a term of not more than one year, or by both such fine and imprisonment, and the court trying such offense may decree that any license theretofore issued under the provisions of this Act or of any law relating to the sale of malt, vinous or spirituous liquors to such person operating the place of business in which said offense was committed be revoked, and may decree that no license for the sale of malt, vinous or spirituous liquors shall ever thereafter be issued to any such person convicted of such violation.

The penalties provided in this section shall not be affected by the penalties provided in any other section or

sections of this Act but shall be construed to be in addition to any and all other penalties."

## **APPENDIX D.**

### **FAIR TRADE ACT**

SESSION LAWS OF COLORADO, 1937, CH. 146.

**"AN ACT TO PROTECT TRADE-MARK OWNERS, DISTRIBUTORS AND THE PUBLIC AGAINST INJURIOUS AND UNECONOMIC PRACTICES IN THE DISTRIBUTION OF ARTICLES OF STANDARD QUALITY UNDER A DISTINGUISHING TRADE-MARK, BRAND OR NAME.**

**BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF COLORADO:**

SECTION 1. No contract relating to the sale or resale of a commodity which bears, or the label or container of which bears, the trade-mark, brand or name of the producer or distributor of such commodity, and which commodity is in free and open competition with commodities of the same general class produced or distributed by others shall be deemed in violation of any law of the State of Colorado by reason of any of the following provisions which may be contained in such contract:

(a) That the buyer will not resell such commodity at less than the minimum price stipulated by the seller;

(b) That the buyer will require of any dealer to whom he may resell such commodity an agreement that he will not, in turn, resell at less than the minimum price stipulated by the seller.

Such provisions in any contract shall be deemed to contain or to imply conditions that such commodity may be resold without reference to such agreement in the following cases:

(a) In closing out the owner's stock for the bona fide purpose of discontinuing dealing in any such commodity and plain notice of the fact is given to the public, provided

that the owner of such stock shall give to the producer of such commodity, or to the distributor, from whom the stock was purchased, prompt and reasonable notice in writing of his intention to close out said stock, and an opportunity to purchase such stock at the original invoice price.

(b) When the trade-mark, brand or name is removed or wholly obliterated from the commodity and is not used or directly or indirectly referred to in the advertisement or sale thereof.

(c) When the goods are damaged or deteriorated in quality and plain notice of the fact is given to the public in the advertisement and sale thereof, such notice to be conspicuously displayed in all advertisements.

(d) By any officer acting under the orders of any court.

SECTION 2. This Act shall not apply to any contract or agreement between or among producers or between or among wholesalers or between or among retailers as to sale or resale prices.

SECTION 3. The following terms, as used in this Act, are hereby defined as follows:

(a) 'Commodity' means any subject of commerce.

(b) 'Producer' means any grower, baker, maker, manufacturer, bottler, packer, converter, processor, or publisher.

(c) 'Wholesaler' means any person selling a commodity other than a producer or retailer.

(d) 'Retailer' means any person selling a commodity to consumers for use.

(e) 'Person' means an individual, a corporation, a partnership, an association, a joint-stock company, a public trust or any unincorporated organization.

SECTION 4. Wilfully and knowingly advertising, offering for sale, or selling any commodity at less than the price stipulated in any contract entered into pursuant to the provisions of this Act, whether the person so advertising, offering for sale, or selling is or is not a party to such contract, is unfair competition and is actionable at the suit of any person damaged thereby.

SECTION 5. If any provision of this Act is declared unconstitutional, it is the intention of the Legislature that the remaining portions thereof shall not be affected, but that such remaining portions remain in full force and effect; but no part of this Act shall prevent the payment of patronage refunds by cooperative agencies or associations existing and operating under the laws of this State.

SECTION 6. This Act may be known and cited as the 'Fair Trade Act'.

SECTION 7. The General Assembly hereby finds, determines and declares this Act to be necessary for the immediate preservation of the public peace, health and safety.

SECTION 8. In the opinion of the General Assembly an emergency exists; therefore, this Act shall take effect and be in force from and after its passage."

Approved: March 15, 1937.

## APPENDIX E.

### UNFAIR PRACTICES ACT

(Chapter 261, Session Laws of 1937, approved and effective May 6, 1937; amended by Chapter 227,

Session Laws of 1941, approved and effective April 15, 1941.)

"AN ACT relating to unfair competition and discrimination, making certain unfair and discriminatory practices unlawful, defining the duties of the Attorney General in regard thereto, declaring certain contracts illegal and forbidding recovery thereon, providing for actions to enjoin unfair competition and discrimination and to recover damages therefor, making the violation of the provisions of this Act a misdemeanor and providing penalties, and to repeal chapter 187, Session Laws of Colorado, 1933.

*Be It Enacted by the General Assembly of the State of Colorado:*

SECTION 1. [*Locality discrimination prohibited.*—] It shall be unlawful for any person, firm, or corporation, doing business in the State of Colorado and engaged in the



production, manufacture, distribution or sale of any commodity, or products, or service or output of a service trade, of general use or consumption, or the sale of any merchandise or product by any public utility, with the intent to destroy the competition of any regular established dealer in such commodity, product or service, or to prevent the competition of any person, firm, private corporation, or municipal or other public corporation, who or which in good faith, intends and attempts to become such dealer, to discriminate between different sections, communities or cities or portions thereof, or between different locations in such sections, communities, cities or portions thereof in this state, by selling or furnishing such commodity, product or service at a lower rate in one section, community or city, or any portion thereof, or in one location in such section, community, or city or any portion thereof, than in another after making allowance for difference, if any, in the grade or quality, quantity and in the actual cost of transportation from the point of production, if a raw product or commodity, or from the point of manufacture, if a manufactured product of commodity. Motion picture films when delivered under a lease to motion picture houses shall not be deemed to be a commodity or product of general use, or consumption, under this Act. Nothing in this Act contained shall be construed to affect or apply to any service or product sold, rendered or furnished by any public utility, the sale, rendition or furnishing of which is subject to regulation by the Colorado Public Utilities Commission or by any municipal regulatory body. This act shall not be construed to prohibit the meeting in good faith of a competitive rate. The inhibition hereof against locality discrimination shall embrace any scheme of special rebates, collateral contracts or any device of any nature whereby such discrimination is, in substance or fact, effected in violation of the spirit and intent of this Act.

SEC. 2. [*Responsibility of agent.*—] Any person who, either as director, officer or agent of any firm or corpor-

ation or as agent of any person, violating the provisions of this Act, assists or aids, directly or indirectly, in such violation shall be responsible therefor equally with the person, firm or corporation for whom or which he acts.

In the prosecution of any person as officer, director or agent, it shall be sufficient to allege and prove the unlawful intent of the person, firm or corporation for whom or which he acts.

SEC. 3. [*Sales below cost prohibited.*—] It shall be unlawful for any person, partnership, firm, corporation, joint stock company, or other association engaged in business within this State, to sell, offer for sale or advertise for sale any article or product, or service or output of a service trade for less than the cost thereof to such vendor, or give, offer to give or advertise the intent to give away any article or product, or service or output of a service trade for the purpose of injuring competitors and destroying competition and he or it shall also be guilty of a misdemeanor, and on conviction thereof shall be subject to the penalties set out in Section 11 of this act for any such act.

(a) The term "cost" as applied to production is hereby defined as including the cost of raw materials, labor and all overhead expenses of the producer; and as applied to distribution "cost" shall mean the invoice or replacement cost, whichever is lower, of the article or product to the distributor and vendor plus the cost of doing business by said distributor and vendor.

(b) The "cost of doing business" or "overhead expense" is defined as all costs of doing business incurred in the conduct of such business and must include without limitation the following items of expense: labor (including salaries of executives and officers), rent, interest on borrowed capital, depreciation, selling cost, maintenance of equipment, delivery costs, credit losses, all types of licenses, taxes, insurance and advertising.

SEC. 4. [*Establishing cost.*—] In establishing the cost of a given article or product to the distributor and vendor,

the invoice cost of said article or product purchased at a forced, bankrupt, closeout sale, or other sale, outside of the ordinary channels of trade may not be used as a basis for justifying a price lower than one based upon the replacement cost as of date of said sale of said article or product replaced through the ordinary channels of trade, unless said article or product is kept separate from goods purchased in the ordinary channels of trade and unless said article or product is advertised and sold as merchandise purchased at a forced, bankrupt, closeout sale, or by means other than through the ordinary channels of trade, and said advertising shall state the conditions under which said goods were so purchased and the quantity of such merchandise to be sold or offered for sale.

SEC. 5. [*Cost of survey deemed competent evidence.*—] In any injunction proceeding or in the prosecution of any person as officer, director or agent, it shall be sufficient to allege and prove the unlawful intent of the person, firm or corporation for whom or which he acts. Where a particular trade or industry, of which the person, firm or corporation complained against is a member, has an established cost survey for the locality and vicinity in which the offense is committed, the said cost survey shall be deemed competent evidence to be used in proving the costs of the person, firm or corporation complained against within the provisions of this act.

SEC. 6. [*Exceptions.*—] The provisions of Section 3, 4, and 5 shall not apply to any sale made:

(a) In closing out in good faith the owner's stock or any part thereof for the purpose of discontinuing his trade in any such stock or commodity, and in the case of the sale of seasonal goods or to the bona fide sale of perishable goods to prevent loss to the vendor by spoilage or depreciation, provided notice is given to the public thereof;

(b) When the goods are damaged or deteriorated in quality, and notice is given to the public thereof;

(c) By an officer acting under the orders of any court;

(d) In an endeavor made in good faith to meet the legal prices of a competitor as herein defined selling the same article or product, or service or output of a service trade, in the same locality or trade area.

Any person, firm or corporation who performs work upon, renovates, alters or improves any personal property belonging to another person, firm or corporation, shall be construed to be a vendor with (within) the meaning of this Act.

SEC. 7. [*Secret rebates prohibited.*—] The secret payment or allowances or rebates, refunds, commissions, or unearned discounts, whether in the form of money or otherwise, or secretly extending to certain purchasers special services or privileges not extended to all purchasers purchasing upon like terms and conditions, to the injury of a competitor and where such payment or allowance tends to destroy competition, is an unfair trade practice and any person, firm, partnership, corporation, or association resorting to such trade practice shall be deemed guilty of a misdemeanor and on conviction thereof shall be subject to the penalties set out in section 11 of this Act.

SEC. 8. [*Contract in violation of Act declared illegal.*—] Any contract, express or implied, made by any person, firm or corporation in violation of any of the provisions of Sections 1 to 7, inclusive, of this Act is declared to be an illegal contract and no recovery thereon shall be had, provided, no part of this Act shall prevent the payment of patronage refunds by cooperative agencies or associations existing and operating under the laws of this State.

SEC. 9. [*Injunction and damages.*—] Any person, firm, private corporation or municipal or other public corporation, or trade association, may maintain an action to enjoin a continuance of any act or acts in violation of sections 1 to 7 inclusive, of this Act and, if injured thereby, for the recovery of damages. If, in such action, the court shall find that the defendant is violating or has violated any of the provisions of sections 1 to 7, inclusive, of this

Act, it shall enjoin the defendant from a continuance thereof. It shall not be necessary that actual damages to the plaintiff be alleged or proved. In addition to such injunction [injunctive] relief, the plaintiff in said action shall be entitled to recover from the defendant three times the amount of the actual damages if any, sustained.

SEC. 10. [*Fine and imprisonment.*—] Any person, firm, or corporation, whether as principal, agent, officer or director, for himself, or itself, or for another person, or for any firm or corporation, or any corporation, who or which shall violate any of the provisions of section 1 to 7, inclusive, of this Act, is guilty of a misdemeanor for each single violation and upon conviction thereof, shall be punished by a fine of not less than one hundred dollars (\$100.00) nor more than one thousand dollars (\$1,000.00), or by imprisonment not exceeding six (6) months or by both said fine and imprisonment, in the discretion of the court.

SEC. 11. [*Constitutionality.*—] If any section, sentence, clause or phrase of this Act is for any reason held to be unconstitutional, such decision shall not affect the validity of the remaining portions of the Act. The Legislature hereby declares that it would have passed this Act, and each section, clause or phrase thereof, irrespective of the fact that any one or more other sections, sentences, clauses or phrases be declared unconstitutional. The remedies herein prescribed are cumulative.

SEC. 12. [*Purpose of Act.*—] The Legislature declares that the purpose of this Act is to safeguard the public against the creation or perpetuation of monopolies and to foster and encourage competition, by prohibiting unfair and discriminatory practices by which fair and honest competition is destroyed or prevented. This act shall be literally construed that its beneficial purposes may be subserved.

SEC. 13. [*Short title.*—] This act shall be known and designated as the "Unfair Practices Act."

SEC. 14. [*Chapter 187, Laws of 1933, repealed.*—] Chapter 187 of the Session Laws of Colorado, 1933, is hereby repealed.

SEC. 15. [*Necessity for Act.*—] The General Assembly hereby finds, determines and declares this Act to be necessary for the immediate preservation of the public peace, health and safety.

SEC. 16. [*Effective date.*—] In the opinion of the General Assembly an emergency exists; therefore, this act shall take effect and be in force from and after its passage."





**APPENDIX F.**

**United States Circuit Court of Appeals**  
**TENTH CIRCUIT.**

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Nos. 2792-2793-2794-2795-2796-2797-2798-2799  
January Term, 1944.

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FRANKFORT DISTILLERIES, INC., NATIONAL DISTILLERS PRODUCTS CORPORATION, BROWN FORMAN DISTILLERS CORPORATION, HIRAM WALKER, INC., SCHENLEY DISTILLERS CORPORATION, SEAGRAM-DISTILLERS CORPORATION, McKESSON & ROBBINS, INCORPORATED, J. E. SPEEGLE, Appellants,

vs.

UNITED STATES OF AMERICA, Appellee.

(February 28, 1944.)

The indictment herein containing two counts was returned against twenty-nine corporations and fifty-four individuals. The first count charges a conspiracy to raise, fix, and maintain the wholesale prices of spirituous liquor and wine shipped into Colorado, and the second charges a like conspiracy to raise, fix, and maintain the retail prices of alcoholic beverages shipped into that state, in restraint of commerce among the several states and in violation of section 1 of the Anti-Trust Act, as amended, 26 Stat. 209, 50 Stat. 693, 15 U.S.C.A. § 1. Nineteen of the corporations are engaged in the production of alcoholic beverages outside of Colorado; eight are wholesalers engaged in the business in Colorado of purchasing alcoholic beverages for resale to retailers; one is a wholesale association whose members are wholesalers doing business in the state, hereinafter referred to as Wholesale

Association; and one is a retail association whose members are retailers engaged in business in the state, hereinafter called Package Association. Some of the individuals are or were officers or employees of the defendant producers; some are officers or employees of the defendant wholesalers; and some are engaged in the sale and distribution at retail of alcoholic beverages in Colorado. Demurrers and motions to quash the indictment were denied. *United States v. Colorado Wholesale Wine & Liquor Dealers Ass'n.*, 47 F. Supp. 160. Thereafter the United States elected to stand on the second count, and the first was dismissed. The defendants Frankfort Distilleries, Inc., National Distillers Products Corporation, Brown Forman Distillers Corporation, Hiram Walker, Incorporated, Schenley Distillers Corporation, Seagram-Distillers Corporation, McKesson & Robbins, Incorporated, and J. E. Speegle each entered a plea of nolo contendere and prayed that the court impose sentence in all things as though a plea of guilty had been interposed. Fines were imposed, separate appeals were perfected, and by stipulation the several appeals were presented on a single record.

The second count defines certain terms and delineates the facts with respect to the several defendants being producer, wholesaler, retailer, officer, or employee, respectively. It contains a description of the nature of the trade and commerce involved. Under this head, it sets out that alcoholic beverages are marketed in Colorado by means of a continuous flow of shipments from producers located outside the state through wholesalers and retailers to the consuming public; that beverages shipped and sold in bottles by producers can be sold to retailers there only by wholesalers licensed under the laws of the state; that thus wholesalers and retailers are conduits through which beverages are shipped into the state and sold and distributed to the consuming public; that approximately 1,150,000 gallons of spirituous liquor produced elsewhere are shipped into the state annually for such sale and distribution; that such liquor constitutes more than ninety-eight percent of all liquor consumed within the state; that approximately 800,000 gallons of wine produced in other states are shipped into Colorado annually for sale and distribution

to the consuming public; that such wine constitutes more than eighty per cent of all wine consumed therein; that substantial amounts of beer produced in other states are shipped into the state for sale and distribution; that alcoholic beverages are distributed to more than 700 retailers in the state by approximately 28 wholesalers; that more than seventy-five per cent of the spirituous liquor and wine and substantial quantities of the beer are sold and distributed by the defendant wholesalers; and that all of the liquor and wine, and substantial quantities of the beer, sold and distributed by the bottle or case to the consuming public, are sold by retailers, including the defendant retailers and other members of defendant Package Association. It then alleges that beginning in or about January, 1936, and continuing to the time of the presentation of the indictment, the defendants combined and conspired to raise, fix, and maintain the retail prices of alcoholic beverages shipped into Colorado from producers located outside the state, by raising, fixing, and stabilizing retail mark-ups and margins of profit; that it was a part of the combination and conspiracy that the defendants from time to time discuss, agree upon, and adopt high, arbitrary, and non-competitive retail prices, mark-ups, and margins of profit, that the defendant associations, wholesalers, and retailers agree upon and undertake a program to persuade, induce, and compel producers, including the defendant producers, and wholesalers, to enter into fair trade contracts affecting every type and brand of alcoholic beverages shipped into Colorado and to establish in and by such contracts, high, arbitrary and artificial retail prices embodying the high, arbitrary, and non-competitive margins of profit agreed upon, that the defendant Package Association prepare and adopt forms of fair trade contracts acceptable to the defendant retailers and to the other members of the association, agree with producers and wholesalers on the forms of fair trade contracts to be used by such producers and wholesalers, and prepare and circulate among its members bulletins and notices announcing the adoption of fair trade contracts and giving the names of producers and wholesalers entering into them and also the names of those not doing so, that the defendant retailers, through the

defendant Package Association, agree to and do patronize only those producers and wholesalers who enter into fair trade contracts embodying such retail prices, mark-ups, and margins of profit, and who require and compel observance of the minimum retail prices established in that manner, agree to and do withhold their patronage from producers and wholesalers who fail or refuse to enter into such fair trade contracts, and agree from time to time with producers and wholesalers respecting revisions in the retail prices established in and by such fair trade contracts so as to preserve and maintain the retail mark-ups and margins of profit agreed upon, that the defendants, acting in part through the defendants Wholesale Association and Package Association, agree to and do police the high, arbitrary, and non-competitive retail prices, mark-ups, and margins of profit, and require and secure observance of them, agree to and do employ paid executives and investigators to spy upon and embarrass retailers who fail or refuse to observe such retail prices, mark-ups, and margins of profit, and threaten to and do institute or cause to be instituted legal proceedings against retailers who fail or refuse to observe such prices, mark-ups, and margins of profits, that the defendant retailers agree among themselves and with the defendant producers and the defendant wholesalers that retailers selling at prices, mark-ups, and margins of profit lower than those established in the fair trade contracts be deprived of the opportunity to purchase beverages from the defendant producers and the defendant wholesalers, that the defendant retailers threaten to and do boycott wholesalers and producers who supply their products to retailers failing or refusing to observe the retail prices, mark-ups, and margins of profit, that to finance such activities the defendants agree upon and provide for the collection of an extra charge added to the wholesale price, the proceeds to be paid to the defendant Wholesale Association and that defendant in turn to pay a portion of such proceeds to the defendant Package Association, that in order to reduce price competition among retailers, defendant retailers attempt to persuade and induce the authorized officials of Colorado and of the City and County of Denver to reject applications for retail liquor licenses, and

that such fair trade agreements be made, agreed upon, and carried out in a manner and for purposes not contemplated by the Miller-Tydings Amendment to the Anti-Trust Act; that the effect of the combination and conspiracy has been to raise, fix, stabilize, and maintain the retail prices of alcoholic beverages shipped in interstate commerce into Colorado and sold and distributed in that state at levels acceptable to and approved by the defendants, to eliminate price competition among the defendant retailers, to eliminate price competition among the members of the defendant Package Association, and to restrain and suppress interstate trade and commerce in alcoholic beverages not covered by fair trade contracts; and that the combination and conspiracy was entered into and carried out in part within the District of Colorado, and further that many of the acts and things were done there.

An indictment is not fatally infirm for vagueness, indefiniteness, and uncertainty if it charges all of the essential elements of the offense in such manner as to advise the accused of the nature and cause of the accusation against him, and to enable him to prepare his defense and plead the judgment of conviction or acquittal in bar to a subsequent prosecution for the same offense. *Evans v. United States*, 153 U. S. 584; *Cochran and Sayre v. United States*, 157 U. S. 286; *Rosen v. United States*, 161 U. S. 29; *Bartell v. United States*, 227 U. S. 427; *United States v. Behrman*, 258 U. S. 280; *Wong Tai v. United States*, 273 U. S. 77; *Hagner v. United States*, 285 U. S. 427; *United States v. Safeway Stores*, — F. (2d) —. This count charges in general language the essential elements of the offense sufficiently for such purposes. And if the means of effectuating the conspiracy are not set out with the required detail and particularity, the remedy is to apply for a bill of particulars. *Glasser v. United States*, 315 U. S. 60; *United States v. Safeway Stores*, *supra*.

In a case of this kind there is jurisdiction either in the district where the conspiracy was formed or in the district where some act was done pursuant to it. The allegations that the conspiracy was entered into and carried out in part within the District of Colorado and that the defendants did

within that district many of the acts charged were sufficient for jurisdictional purposes to lay venue there. *Hyde v. United States*, 225 U. S. 347; *Brown v. Elliott*, 225 U. S. 392; *United States v. Trenton Potteries*, 273 U. S. 392; *United States v. Socony-Vacuum Co.*, 310 U. S. 150; *United States v. Safeway Stores*, *supra*.

The Twenty-first Amendment does not strip the national government of all authority to legislate in respect of interstate commerce in intoxicating liquor. *Hayes v. United States*, 112 F. (2d) 417; *Washington Brewers Institute v. United States*, 137 F. (2d) 964. But it does sanction the right of a state to legislate concerning the importation of such liquor from other states, unfettered by the Commerce Clause. *Ziffrin, Inc. v. Reeves*, 308 U. S. 132; Cf. *Carter v. Virginia*, — U. S. —. In this connection, Colorado has a Fair Trade Act, chapter 146, Laws of 1937; an Unfair Practices Act, chapter 261, Laws of 1937; and a Liquor Code, sections 15-47, chapter 89, Colorado Statutes Annotated of 1935. Under section 1 of the Fair Trade Act a contract relating to the sale or resale of a commodity bearing the trade-mark, brand, or name of the producer or distributor, and which commodity is in free and open competition, shall not be deemed in violation of any law of the state by reason of providing that the buyer will not resell such commodity at less than the minimum price stipulated by the seller or that the buyer will require of any dealer to whom he may resell such commodity an agreement that he will not resell at less than the minimum prices stipulated by the seller. Section 3 of the Unfair Practices Act provides that it shall be unlawful for anyone engaged in business in the state to sell, offer for sale, or advertise for sale, any article or product for less than the cost thereof to the vendor, or give, offer to give, or advertise the intent to give away any article or product for the purpose of injuring competitors and destroying competition. Section 17 of the Liquor Code, as amended by chapter 160, Laws of 1941, makes it unlawful wilfully and knowingly to advertise, offer for sale, or sell vinous liquors, spirituous liquors and alcoholic beverages at less than the price stipulated in any contract entered into pursuant to the provisions



of the Fair Trade Act; section 29 provides for a manufacturer's license, a wholesaler's license, and a retail liquor store license; and section 20 authorizes the licensing authority, created by the preceding section, to make rules and regulations pursuant to the licensing provisions. Regulation 1 (3) promulgated under the Liquor Code provides that all spirituous liquor sold or transferred within the state must be affixed with the proper stamps before sale or transfer, and that wholesalers shall affix the proper stamps upon all liquor sold by them within the state to retailers or consumers prior to delivery; and regulation 12 C provides that all alcoholic liquor shall be the sole and exclusive property of and subject to the unrestricted power of disposal of a duly licensed Colorado wholesale dealer, as defined in the Liquor Code, at the time such liquor crosses the state line coming into the state for the purpose of being sold, offered for sale, or used there. Appellants point with emphasis to these statutes and regulations as constituting legal warrant for the fair trade agreements referred to in the indictment. And, justifying his appearance in the case by reference to the observation of the court in *Washington Brewers Institute v. United States*, supra, that significantly no state had appeared as a friend of the court to protest the enforcement of the Anti-Trust Act, the Attorney of Colorado filed in this cause a brief as *amicus curiae*, calling attention to these statutes and regulations and contending that the fair trade contracts described in the indictment were entered into under the Fair Trade Act and the Liquor Code, that they are removed from the regulation and control of the United States, and that they are subject exclusively to the control and operation of the law of Colorado.

Aside from the diminution *pro tanto* which may be found in the Twenty-first Amendment in respect of the transportation of intoxicating liquor, Congress has plenary power under the Commerce Clause to regulate commerce among the several states. And that power is not confined in all cases to the regulation of interstate commerce. It extends in sweep to intrastate activities which affect interstate trade or the exercise of the power of Congress over it in such



manner as to make the regulation of them necessary or appropriate for the protection of the free flow of interstate commerce. *United States v. Darby*, 312 U. S. 100.

A combination or agreement for price maintenance or which operates directly on prices or price structures of commodities moving in interstate commerce constitutes an unreasonable restraint within the Anti-Trust Act, without regard to whether the prices or price structures agreed upon are reasonable or otherwise, *United States v. Trenton Potteries*, supra; *Ethyl Gasoline Corp. v. United States*, 309 U. S. 436; *United States v. Socony-Vacuum Oil Co.*, supra; *United States v. Masonite Corp.*, 316 U. S. 265; one not fixing prices but intended unreasonably to restrict or restrain interstate commerce or which by its operation necessarily impedes the due course of such commerce comes within the act, *Coronado Coal Co. v. United Mine Workers*, 268 U. S. 295; one which contemplates restraint of interstate trade but to be effectuated by acts constituting intrastate activities is met with the condemnation of the act, *Bedford Cut Stone Co. v. Journeymen Stone Cutters' Ass'n.*, 274 U. S. 37; *Local 167, International Brotherhood of Teamsters v. United States*, 291 U. S. 293; and one primarily local likewise finds itself within the ambit of the act if the means adopted to effectuate it operate to lay a direct and undue burden on interstate commerce, *Industrial Ass'n. v. United States*, 268 U. S. 64. But a combination or concert, express or implied, limited in its objectives to intrastate activities, with no intent or purpose to affect interstate commerce, is without the reach of the act, even though there may be an indirect and insubstantial effect on interstate commerce. *United Mine Workers v. Coronado Coal Co.*, 259 U. S. 344; *United Leather Workers v. Herkert*, 265 U. S. 457; *Industrial Ass'n. v. United States*, supra; *Levering & Garrigues Co. v. Morrin*, 289 U. S. 103.

The gist of the offense charged in the second count is the agreement or confederation, in violation of the Anti-Trust Act. *Dealy v. United States*, 152 U. S. 539; *Williamson v. United States*, 207 U. S. 425; *Braverman v. United States*, 317 U. S. 49; *United States v. Safeway Stores*, supra. And the offense cannot be charged in the general language of the statute. The indictment must descend to particulars and charge

the constituent ingredients of which the offense is composed. It is not enough to charge in general language that a conspiracy was formed to raise, fix, and maintain retail prices, by raising, fixing, and stabilizing retail mark-ups and margins of profit, in restraint of commerce among the states. A general charge of that kind in the language of the statute would not suffice. *United States v. Safeway Stores*, supra.

Obedient the necessity of doing so, the indictment descends to particulars and undertakes to charge the essential elements of which the offense is composed. But the agreement as pleaded is essentially one to fix and maintain prices at which alcoholic beverages shall be sold at retail in Colorado. Under regulation 12 C, supra, it is impossible for a retailer in that state to buy liquor from a producer. He can purchase it only from a wholesaler licensed under the laws of the state. Before liquor produced in other states can be acquired from the wholesaler title vests in the wholesaler at the time it crosses the state line coming into the state, and the required stamps must be affixed by the wholesaler. And when it comes to rest in the ownership and custody of the wholesaler, is placed in the warehouse of the wholesaler for local disposition to the retailer, and is commingled with other merchandise, it ceases to be an integral part of interstate commerce. *Industrial Ass'n. v. United States*, supra; *Walling v. Jacksonville Paper Co.*, 317 U. S. 564; *Higgins v. Carr Bros. Co.*, 317 U. S. 572; *Jewel Tea Co. v. Williams*, 118 F. (2d) 202; *Jax Beer Co. v. Redfern*, 124 F. (2d) 172; *Walling v. Goldblatt Bros.*, 128 F. (2d) 778; *Allesandro v. C. F. Smith Co.*, 136 F. (2d) 75. And sales subsequently made by the wholesaler to retailers and in turn by retailers to the consuming public are wholly intrastate transactions. *Jewel Tea Co. v. Williams*, supra.

The control of the handling, the sales, and the prices at the point of origin before movement in interstate commerce begins, or in the state where it ends, may in some circumstances directly and unduly burden interstate commerce. *Dr. Miles Medical Co. v. Park & Sons Co.*, 220 U. S. 373; *Local 167, International Brotherhood of Teamsters v. United States*, supra. But here it is not charged that the parties agreed and conspired to fix and maintain prices at which producers

or others outside Colorado should sell their products to wholesalers within the state. Neither is it charged that it was a part of the agreement that producers should establish uniform prices from all producers and distillers to all wholesalers in Colorado of certain types, ages, or qualities of liquor moving in interstate commerce. No charge of that kind direct or remote is to be found in the indictment.

True, it is charged that it was part of the agreement that the retailers patronize only those producers and wholesalers who enter into fair trade contracts and withhold their patronage from those who fail to do so; that the retailers agree with the producers and wholesalers that retailers selling at prices lower than those established in the fair trade contracts be deprived of the opportunity to purchase from the defendant producers and wholesalers; and that the defendant retailers threaten to boycott and do boycott producers and wholesalers who supply their products to retailers failing or refusing to observe such retail prices, mark-ups, and margins of profits. But the words "patronize" and "patronage" as used clearly refer to the purchase of beverages from producers and wholesalers. And it is perfectly obvious that these allegations are completely innocuous and ineffective in charging an offense under the Anti-Trust Act for the reason that, as previously said, retailers in Colorado cannot purchase from producers, and sales from wholesalers to retailers in that state are intrastate transactions.

The second count is completely barren of any allegations of fact effectively showing that the combination and agreement operated directly and substantially to restrict or burden the free and untrammelled flow of interstate commerce. The combination as pleaded was one intended to affect only intrastate activities. Its objective was control of domestic enterprise within the state, and it spent its direct and substantial force upon intrastate activities. Its effect, if any, on interstate commerce was indirect, insubstantial, and incidental. A combination of that kind lies beyond the reach of the Anti-Trust Act.

The judgments are severally reversed and the causes remanded with direction to dismiss the indictments as to these appellants.





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CHARLES ELMORE CONLEY  
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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1944.

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UNITED STATES OF AMERICA, *Petitioner,*

v.

FRANKFORT DISTILLERIES, INC.; NATIONAL DISTILLERS PRO-  
DUCTS CORPORATION; BROWN FORMAN DISTILLERS CORPO-  
RATION; HIRAM WALKER, INCORPORATED; SCHENLEY  
DISTILLERS CORPORATION; SEAGRAM-DISTILLERS CORPO-  
RATION; MCKENNON & ROBBINS, INCORPORATED; J. E.  
SPREngle.

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On Writs of Certiorari to the United States Circuit Court of  
Appeals for the Tenth Circuit.

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**BRIEF FOR THE RESPONDENTS.**

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**Supreme Court of the United States**

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UNITED STATES OF AMERICA, *Petitioner*,

v.

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On Writs of Certiorari to the United States Circuit Court of Appeals for the Tenth Circuit.

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**BRIEF FOR THE RESPONDENTS.**

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**OPINIONS BELOW.**

The opinion of the Circuit Court of Appeals (R. 81) is reported in 144 F. (2d) 824. The opinion of the District Court (R. 32) is reported in 47 F. Supp. 160.

**JURISDICTION.**

The judgments of the Circuit Court of Appeals were entered on August 26, 1944 (R. 108-111). Petition for a writ of certiorari was filed September 30, 1944, and was granted

November 13, 1944 (R. 113-115). The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code as amended by the Act of February 13, 1925, and as modified by Rule XI of the Criminal Appeals Rules.

### STATEMENT OF CASE.

The statement in the petitioner's brief summarizes the allegations of the indictment and describes the proceedings leading up to the judgments appealed from. However, an understanding of the issues raised by this case requires elaboration of certain points.

With respect to the nature of the business involved, as pointed out in petitioner's statement, the indictment alleges: "Under the laws of the state of Colorado, alcoholic beverages shipped and sold in bottles by producers thereof may be sold to retailers in the State of Colorado only by wholesalers licensed as such under the laws of Colorado" (R. 7). As will appear from our argument, even this allegation is an incomplete statement of the extent to which the Colorado liquor laws insulate the retail liquor business from interstate commerce.

That retail liquor business was the sole object of the claimed conspiracy. Paragraph 30 of the indictment describes the conspiracy in general terms as one to raise, fix and maintain the *retail prices* of alcoholic beverages by raising, fixing and stabilizing *retail mark-ups and margins of profit* (R. 12). The opinion of the Circuit Court of Appeals characterizes the agreement as pleaded as "essentially one to fix and maintain prices at which alcoholic beverages shall be sold at retail in Colorado" (R. 93).

It is not claimed, however, that this is the ordinary type of price fixing conspiracy, in which competing sellers agree upon prices at which they will sell like products. There is no allegation in the indictment, and no inference from all of its allegations, that there was any agreement between producers as to the prices at which their competing products should be sold to wholesalers in interstate com-

merce. Neither is there any allegation or inference of any such agreement between wholesalers or between retailers. The alleged conspiracy is solely with respect to the amount of retail mark-up. Similar types of liquor made by different producers are not uniformly priced. They are in active price competition with each other in sales to wholesalers, retailers and consumers.

The indictment makes it clear that the alleged agreement to fix retail prices was made effective entirely by means of fair trade contracts, contracts under which the sellers of liquor fixed the minimum prices at which Colorado retailers might sell it to Colorado consumers. The factual allegations of the particulars of the conspiracy, with one exception, describe activities relating to such contracts (Paragraph 31(b)-(g) and (i), R. 13-15). Fair trade contracts are specifically authorized by the laws of Colorado and by the Miller-Tydings Amendment to the Sherman Act. The significance of this fact will appear in the course of our argument.

A final point to be noted is that the initiators of the alleged conspiracy are the Colorado retailers. It is not a combination by producers in various states to fix retail prices in Colorado. It is a combination by Colorado retailers operating exclusively within the limits of Colorado to regulate retailing activities in that state. Such retailers "persuade, induce and compel" producers and wholesalers to enter into fair trade contracts covering Colorado retail sales (Paragraph 31(b), R. 13). The sweeping statement in petitioner's brief (p. 11) with respect to horizontal agreement is not justified. So far as appears from the indictment no producer has agreed with any other producer on anything. The producers' only part in the alleged conspiracy has been acquiescence in the demands of Colorado retailers that their products sold at retail in Colorado shall be sold under the protection of enforceable fair trade contacts.



## SUMMARY OF ARGUMENT.

### I.

The allegations of the indictment, read in the light of Colorado legislation regulating the liquor traffic, make it clear that the retail liquor business to which the alleged conspiracy relates is intrastate and not interstate commerce. *Schechter Poultry Corporation v. United States*, 295 U. S. 495; *Industrial Association of San Francisco v. United States*, 268 U. S. 64; *Walling v. Jacksonville Paper Co.*, 317 U. S. 564; *Higgins v. Carr Brothers Co.*, 317 U. S. 572.

### II.

Since the alleged conspiracy relates to intrastate transactions and local objectives, it does not fall within the scope of the Sherman Act unless it is shown to have a substantial effect upon interstate commerce. Decisions of this Court dealing with similar situations make it clear that the allegations of the indictment are insufficient to establish that the activities alleged had such substantial effect. *Industrial Association of San Francisco v. United States*, *supra*; *Levering & Garrigues Co. v. Morrin*, 289 U. S. 103; *United Mine Workers v. Coronado Coal Co.*, 259 U. S. 344; *United Leather Workers v. Herkert & Meisel Trunk Co.*, 265 U. S. 457.

The Government relies upon decisions of this Court condemning illegal systems of resale price maintenance. In all of the cited cases a vendor in one state had fixed prices upon sales in other states as part of a scheme for interstate distribution of his products. Those cases are not applicable here where retailers in Colorado have initiated a plan relating only to retail prices in Colorado. The controlling decisions are those sustaining systems of resale price maintenance under state laws prior to the enactment of the Miller-Tydings Amendment to the Sherman Act. *Max Factor & Co. v. Kunsman*, 5 Cal. (2d) 446, 55 P. (2d) 177 (1936), *affd. in Kunsman v. Max Factor & Co.*, 299 U. S.

198; *Joseph Triner Corp. v. McNeil*, 363 Ill. 559, 2 N. E. (2d) 929 (1936), and *Seagram-Distillers Corp. v. Old Dearborn Distributing Company*, 363 Ill. 610, 2 N. E. (2d) 940 (1936), *affd.* in *Old Dearborn Distributing Co. v. Seagram-Distillers Corp.*, and *McNeil v. Joseph Triner Corp.*, 299 U. S. 183.

The Government relies also on cases condemning conspiracies effected through certain types of boycott. An analysis of the allegations of the indictment with respect to withholding patronage and boycott shows only a refusal by Colorado retailers to purchase from Colorado wholesalers beverages not subject to satisfactory contracts with respect to retail prices in Colorado. None of the cases cited by the Government presented this situation of a boycott effected only in local transactions and having only a local purpose. The cases do not support the Government's position that such a boycott restrains interstate commerce simply because the market of producers or wholesalers shipping or receiving goods in interstate commerce may thereby be narrowed.

### III.

A construction of the Sherman Act to cover activities of the essentially local character alleged in the indictment, relating only to alcoholic beverages in which there is a peculiar local interest, will seriously limit the freedom of Colorado and other states to work out their own local policies. Such legislation as the Colorado Fair Trade and Unfair Practices Acts and the Colorado Liquor Code raises questions of policy upon which there may be legitimate differences of opinion. With respect to local activities these questions of policy should be determined by local authorities, in the light of local conditions and local needs, unless substantial effect upon interstate commerce is shown. No such showing is made by this indictment.

## ARGUMENT.

### I.

#### **The Retail Liquor Business in Colorado with which the Alleged Conspiracy Is Concerned Is Intrastate and Not Interstate Commerce.**

The indictment in this case relates exclusively to liquor sales by Colorado retailers to Colorado consumers. As pointed out in our Statement, the indictment itself alleges that alcoholic beverages may be sold to retailers in the state of Colorado only by wholesalers licensed as such under the laws of Colorado. An examination of the Colorado statutes shows that this is not a mere technical requirement, satisfied by change of title without interruption of transit or other purely formal arrangement.

The law of Colorado, to effectuate a policy of border control, requires all alcoholic liquors to be the sole and exclusive property of a duly licensed Colorado wholesaler at the moment such liquors cross the Colorado State line (Regulation 12 C of the State Licensing Authority). All such liquors must be affixed with the proper State excise tax stamp by the state licensed wholesaler before sale or transfer within the State (Regulation 1(3)).<sup>1</sup> In other

<sup>1</sup> The regulations were promulgated by the State Licensing Authority pursuant to Section 23(c) of the Colorado Liquor Code (Colorado Statutes Annotated (1935), Chapter 89, Section 38(c)), printed in the Appendix (*infra*, p. 38). The relevant provisions of Regulation 1 are as follows:

"3. All malt, vinous and spirituous liquors sold or transferred within the State of Colorado must be affixed with the proper stamps before sale or transfer. Manufacturers, rectifiers and the first licensee receiving liquor within the State are primarily liable for the excise tax. \* \* \* Wholesalers shall affix the proper stamps upon all liquors sold by them within this State to retailers or consumers prior to delivery. \* \* \*

"4. Only Colorado licensed manufacturers, rectifiers and wholesalers shall be permitted to purchase excise tax stamps from the State Treasurer. \* \* \*

Regulation No. 12 C is as follows:

words, before liquor imported into Colorado can be sold or offered for sale to any retailer it must become the property of a licensed Colorado wholesaler and come to rest in his warehouse in order that the cases may be broken open and the state tax stamps affixed by him to each individual bottle.

It is clear that alcoholic beverages delivered to the wholesaler in accordance with these requirements are no longer in interstate commerce and that the subsequent sales to retailers and by retailers to consumers are intrastate commerce. *Schechter Poultry Corporation v. United States*, 295 U. S. 495, raised the question whether poultry, purchased from commission men at markets or railroad terminals where it arrived from other states and taken to a wholesaler's local plant for slaughter and disposition to local retailers and butchers, was still in interstate commerce. The Court said (pp. 542-43):

"When defendants had made their purchases, whether at the West Washington Market in New York City or at the railroad terminals serving the City, or elsewhere, the poultry was trucked to their slaughterhouses in Brooklyn for local disposition. The interstate transactions in relation to that poultry then ended. Defendants held the poultry at their slaughterhouse markets for slaughter and local sale to retail dealers and butchers who in turn sold directly to consumers. Neither the slaughtering nor the sales by defendants were transactions in interstate commerce."

*Industrial Association of San Francisco v. United States*, 268 U. S. 64, involved a combination of contractors and

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"It is hereby required that all alcoholic liquors and fermented malt beverages shall be the sole and exclusive property of and subject to the unrestricted power of disposal of a duly licensed Colorado wholesale liquor dealer as defined in Section 17 of Chapter 142 or Section 5(2) of Chapter 82, Session Laws of Colorado of 1935 at the time such liquors and malt beverages cross the Colorado State line and are imported into this State for the purpose of being sold, offered for sale or used in this State."

dealers in builders' materials in San Francisco which acted to prevent sales of building materials except to contractors who supported the combination's open shop policy. The Court, holding no violation of the Sherman Act was established, said (p. 78):

"It is true, however, that plaster, in large measure produced in other states and shipped into California, was on the list; but the evidence is that the permit requirement was confined to such plaster as previously had been brought into the state and commingled with the common mass of local property, and in respect of which, therefore, the interstate movement and the interstate commercial status had ended."

Any doubt as to the continued authority of these cases has been dispelled by the decisions of this Court in cases under the Fair Labor Standards Act. *Walling v. Jacksonville Paper Co.*, 317 U. S. 564, and *Higgins v. Carr Brothers Co.*, 317 U. S. 572, both involved the status of delivery employees of wholesalers at warehouses receiving merchandise in interstate commerce but delivering it exclusively in the states where the warehouses were located. The *Jack-sonville* case involved three types of transactions. Some merchandise was purchased upon order by particular customers with the definite intention that it should be promptly delivered to those customers. Other merchandise was purchased by the wholesaler to meet the needs of particular customers pursuant to a preexisting contract or understanding with those customers. With respect to both these types of transactions, this Court held that the goods remained in commerce until they actually reached the customers. There was a practical continuity of movement from the manufacturers or suppliers without the state, through the wholesaler's warehouses, and on to customers whose prior orders or contracts were being filled.

No allegations in the present indictment support the conclusion that the Colorado liquor business is of this character. The nature of the product and the Colorado liquor

laws negative any such idea. Liquor is not a specialty item, with particular customers ordering special products. It consists almost entirely of standard merchandise suitable for the needs of all or large groups of customers.

The transactions involved in this indictment fall rather within the third class of business considered in the *Jacksonville* case and the only class considered in the *Higgins* case. Commodities ordered by the wholesaler and received in interstate commerce were placed in the warehouse to meet the anticipated needs of retail customers who ordered them from the wholesaler in accordance with their changing requirements. As to such commodities when the merchandise was unloaded at the wholesaler's place of business "interstate movement had ended." "Subsequent local sales and deliveries were purely intrastate activities \* \* \*." *Higgins v. Carr Brothers Co.*, 138 Me. 264, 25 A. (2d) 214, 216. The same conclusion has been reached in numerous decisions by the Circuit Court of Appeals.

*Jewel Tea Co. v. Williams*, 118 F. (2d) 202 (C. C. A. 10th, 1941);

*Jax Beer Co. v. Redfern*, 124 F. (2d) 172 (C. C. A. 5th, 1941);

*Allesandro v. C. F. Smith Co.*, 136 F. (2d) 75 (C. C. A. 6th, 1943);

*Walling v. Sanders*, 136 F. (2d) 78 (C. C. A. 6th, 1943).

We do not understand that the petitioner now seriously urges that the alcoholic beverages remain in interstate commerce after they reach the Colorado wholesaler's warehouse. To be sure, petitioner's brief does suggest (p. 27) that no allegation of the indictment shows that the beverages might not have remained in interstate commerce. It is novel doctrine that a Sherman Act indictment is sufficient if the facts alleged show that the commerce alleged to be restrained might be interstate. What is required is facts showing that it was interstate. The facts in this case and the law of Colorado combine to establish the opposite.

Petitioner does not even argue that the allegations of Paragraph 18 of the indictment (R. 7), that alcoholic beverages are marketed in the state of Colorado "by means of a continuous flow of shipments from producers located outside the state of Colorado, through wholesalers and retailers, to the consuming public", and that "wholesalers and retailers are the conduit through which alcoholic beverages" shipped from other states are distributed to consumers in Colorado, are sufficient for this purpose. The allegations were, of course, designed to bring the case within the stream of commerce doctrine enunciated in *Swift and Company v. United States*, 196 U. S. 375. The cases already cited make it clear that it is inapplicable. It was considered and expressly rejected in the *Schechter* case, *supra*, 295 U. S. at 543-44, and the *Industrial Association* case, *supra*, 268 U. S. at 79.

It did not change the result in the *Jacksonville Paper* case, even though it appeared that the wholesaler's customers formed a fairly stable group, that their orders were recurrent as to kind and amount of merchandise and that it was possible to estimate with considerable precision the needs of the trade. These facts were insufficient to establish that "practical continuity in transit necessary to keep a movement of goods 'in commerce'"; "that the goods in question were different from goods acquired and held by a local merchant for local disposition." 317 U. S. at 570.

Not even these facts appear in the present case. Not only as a matter of practice but by specific statutory requirement there must be a change in title to liquor between producer and wholesaler and between wholesaler and retailer. Shipments must be delivered to the wholesalers' warehouses, in order that the cases can be broken open and state tax stamps affixed to each individual bottle. There can be no further movement in interstate commerce and delay of

<sup>2</sup> There is no question here of wholesalers acting as mere agencies for producers such as was involved in *Binderup v. Pathe Exchange Inc.*, 263 U. S. 291.



uncertain duration in the wholesalers' warehouses and on the retailers' shelves is, a normal incident of the traffic. Under these circumstances, to consider retail transactions as a part of a flow of commerce is to characterize as interstate commerce every transaction in a commodity which has ever moved interstate.

## II.

### **The Alleged Conspiracy Does Not Have the Substantial Economic Effect Upon Interstate Commerce Necessary to Bring It Within the Scope of the Sherman Act.**

Although the alleged conspiracy relates only to the retail liquor business in Colorado, and although exclusively intrastate transactions and local objectives are involved, the question remains whether it so affects interstate commerce as to come within the condemnation of the Sherman Act. This is a question of construction of the Sherman Act, and not one of the extent of federal power under the terms of different statutes. The fact that one phase of an enterprise may be subject to control under one federal statute, for example the National Labor Relations Act, does not mean that a different phase of the same enterprise comes within the commerce protected by the Sherman law. *Kirschbaum Co. v. Walling*, 316 U. S. 517, 521. The answer to the question whether the activities here alleged are restraints of interstate commerce forbidden by the Sherman Act is to be found in the cases construing that Act.

In analyzing those cases, we must take into account that the construction of the Sherman Act, like other problems under the Commerce Clause, involves the application of the test whether the activities in question exert a substantial economic effect upon interstate commerce, and that this problem in each case is one of degree. Furthermore, where, as here, the Sherman Act is proposed to be applied to new facts which show only intrastate activity, and to a commodity requiring unique local control, that question of degree may not be considered "without regard to the impli-

cations of our dual system of government.” *Kirschbaum Co. v. Walling, supra*, at p. 520. In the words of former Chief Justice Hughes (*Santa Cruz Fruit Packing Co. v. National Labor Relations Board*, 303 U. S. 453, 466):

“It is also clear that where federal control is sought to be exercised over activities which separately considered are intrastate, it must appear that there is a close and substantial relation to interstate commerce in order to justify the federal intervention for its protection. However difficult in application, this principle is essential to the maintenance of our constitutional system. The subject of federal power is still ‘commerce,’ and not all commerce but commerce with foreign nations and among the several States. The expansion of enterprise has vastly increased the interests of interstate commerce but the constitutional differentiation still obtains. *Schechter Corporation v. United States*, 295 U. S. 495, 546. ‘Activities local in their immediacy do not become interstate and national because of distant repercussions.’ *Id.*, p. 554.”

We believe that an analysis of the Sherman Act cases in the light of these considerations clearly establishes that there was here no forbidden restraint of interstate commerce.

A situation similar to that here in question was presented by *Industrial Association of San Francisco v. United States, supra*. An association of contractors and other associations and individuals combined to enforce an “open shop” labor policy by preventing contractors not cooperating from obtaining building materials. As pointed out above, the restrictions were limited to commodities produced in California or materials shipped in which had come to rest within the state. Both coercive and persuasive measures were used to enforce the restrictions, the effect of which was to exclude non-complying contractors from operating and, as a necessary consequence, from purchasing in interstate commerce materials which they would normally have used in their business. The Court held that the combina-

tion did not violate the Sherman Act, saying (268 U. S. 77, 82):

"\* \* \* The thing aimed at and sought to be attained was not restraint of the interstate sale or shipment of commodities, but was a purely local matter, namely, regulation of building operations within a limited local area, so as to prevent their domination by the labor unions. Interstate commerce, indeed commerce of any description, was not the object of attack, 'for the sake of which the several specific acts and courses of conduct were done and adopted.' *Swift and Company v. United States*, 196 U. S. 375, 397. The facts and circumstances which led to and accompanied the creation of the combination and the concert of action complained of, which we have briefly set forth, apart from other and more direct evidence, are 'ample to supply a full local motive for the conspiracy.' *United Mine Workers v. Coronado Co.*, 259 U. S. 344, 411."

"\* \* \* The alleged conspiracy and the acts here complained of, spent their intended and direct force upon a local situation,—for building is as essentially local as mining, manufacturing or growing crops,—and if, by a resulting diminution of the commercial demand, interstate trade was curtailed either generally or in specific instances, that was a fortuitous consequence so remote and indirect as plainly to cause it to fall outside the reach of the Sherman Act."

*Levering & Garrigues Co. v. Morrin*, 289 U. S. 103, involved a suit to enjoin a strike of structural steel workers in New York. Structural steel used in New York was shipped from other states and the necessary result of the strike was to put an end to this interstate commerce, yet it was held that no violation of the Sherman Act was involved. The opinion states (289 U. S. at p. 107):

"\* \* \* Accepting the allegations of the bill at their full value, it results that the sole aim of the conspiracy was to halt or suppress local building operations as a means of compelling the employment of union labor, not for the purpose of affecting the sale or transit of materials in interstate commerce. Use of the materials

was purely a local matter, and the suppression thereof the result of the pursuit of a purely local aim. Restraint of interstate commerce was not an object of the conspiracy. Prevention of the local use was in no sense a means adopted to effect such a restraint. It is this exclusively local aim, and not the fortuitous and incidental effect upon interstate commerce, which gives character to the conspiracy. Compare *Bedford Cut Stone Co. v. Stone Cutters Assn.*, 274 U. S. 37, 46-47; *Anderson v. Shipowners Assn.*, 272 U. S. 359, 363-364. If thereby the shipment of steel in interstate commerce was curtailed, that result was incidental, indirect and remote, and, therefore, not within the anti-trust acts, as this court, prior to the filing of the present bill, had already held."

In addition to these cases holding that local restrictions with respect to sale or use of articles which have moved in interstate commerce do not violate the Sherman Act, even though they will inevitably affect interstate commerce by substantially changing conditions of demand, there are, of course, cases reaching a like conclusion with respect to restrictions on production of articles destined for interstate commerce. *United Mine Workers v. Coronado Coal Co.*, 259 U. S. 344; *United Leather Workers v. Herkert & Meisel Trunk Co.*, 265 U. S. 457. In those cases likewise, although the local activity by reducing the supply of commodities available for the interstate market will inevitably affect the interstate flow and the competitive conditions and prices in that market, there is no forbidden restraint under the Sherman Act so long as an effect upon the interstate market is not the objective of the conspiracy.

There are no allegations of fact in this indictment establishing that there was any different or greater effect on interstate commerce than that incidental to changes in demand resulting from local activities, which was also present in the cases cited. There is no allegation of any interference with the movement of liquor into Colorado. There is no allegation of any effect on the price in interstate commerce, or the quality. There is not even any allegation of

fact showing that the quantity of liquor shipped into Colorado was in any way reduced. There are only general allegations that commerce was restrained, which are mere conclusions not admitted by respondents' pleas of *nolo contendere*.

The petitioner's argument that the activities here alleged violate the Sherman Act rests upon two types of cases, decisions of this Court condemning systems of resale price maintenance and decisions condemning conspiracies effected through certain types of boycott. Not one of the cases cited presents a factual situation comparable to that alleged in this case—an agreement initiated by retailers in a single state, affecting and intended to affect only the local retail disposition of commodities which are subject to peculiar constitutional and statutory local control and which are at rest in that state after interstate commerce has ended, and obtained and enforced by refusal to purchase such commodities from local dealers. Such a situation plainly is primarily the concern of the single state involved. By comparison with the interest of that state, any effect upon interstate commerce is insubstantial. No problem of a far-reaching conspiracy with which the local authorities can not effectively deal is presented. If remedial action is required, it is well within the power of those authorities.

#### A. *The Resale Price Maintenance Cases.*

The petitioner relies upon *Dr. Miles Medical Company v. Park & Sons Co.*, 220 U. S. 373, *Ethyl Gasoline Corporation v. United States*, 309 U. S. 436, *United States v. Univis Lens Co.*, 316 U. S. 241, and *United States v. Bausch & Lomb Co.*, 321 U. S. 707. Each of these cases involved a system of price maintenance initiated by a producer<sup>3</sup> in one state and effective in every state where the product was marketed. In the *Dr. Miles* and *Univis* cases price maintenance

<sup>3</sup> In the *Bausch & Lomb* case the system was initiated by an exclusive distributor which may, for present purposes, be regarded as the producer.

was enforced in wholesale as well as retail, and in interstate as well as intrastate transactions. In the *Univis*, *Bausch & Lomb* and *Ethyl* cases, the producer made it a condition of his interstate sales that the purchaser sell only to customers selected and licensed by him. The selection of distributors to be licensed was based not only upon their cooperation in maintaining prices on the producer's own product, but on general selling policies with respect to other products—in the *Ethyl* case upon a policy of adherence to posted prices of the major gasoline companies, and in the *Univis* and *Bausch & Lomb* cases upon a general policy of not cutting prices upon any products and of avoidance of such practices as price advertising, installment selling, or maintaining places of business in jewelry or department stores.

The petitioner suggests that these facts have no importance, that there is no difference in the effect upon interstate commerce between the situations considered in those cases and the one alleged in the indictment. We believe that the differences are real and substantial. In the cases cited a producer in one state was establishing, as part of an interstate system of distribution, rules for the conduct of trade interstate and within other states. His policy in any one state was dictated not by market conditions in that state, but by manufacturing conditions in the state of manufacture and by market conditions throughout the country. The producer effectively determined the profits to be realized by all distributors, those in interstate commerce and those in the several states, always presumably with the ultimate objective of obtaining the maximum profits from its own business. In short, the motives were not local but national. The means likewise were not local but national. The immediate instrument for affecting conditions in the several states was the producer's interstate business. In part for that reason, the states in which the product was distributed could have no effective regulatory power. Action to remedy the local situation might result only in cutting off the flow of goods entirely.



In the present case, a particular price policy has been initiated by the retailers in a single state for the sole purpose of affecting conditions in the retail trade in that state. The immediate instrument for effecting this policy is not interstate commerce, but refusal to purchase in local transactions commodities not sold in accordance with the local policy. There is no attempt to affect manufacturing or selling conditions in other states. Interstate commerce is affected only in the sense that conditions of local demand must always affect it, by cutting down the flow of commodities which for any reason are not purchased in the local market.<sup>4</sup>

The cases which cover such a situation are those upholding fair trade contracts entered into pursuant to state laws prior to the adoption of the Miller-Tydings Amendment to the Sherman Act. It was a frequent defense in such cases that the fair trade acts were unconstitutional because they were a regulation of interstate commerce. The courts consistently held that where the contracts in issue were limited to setting resale prices on intrastate transactions there was no such effect upon interstate commerce as to result in a conflict with the federal commerce power.

*Max Factor & Co. v. Kunsman*, 5 Cal. (2d) 446, 55 P. (2d) 177 (1936);

*Joseph Triner Corp. v. McNeil*, 363 Ill. 559, 2 N. E. (2d) 929 (1936);

*Seagram-Distillers Corp. v. Old Dearborn Distributing Company*, 363 Ill. 610, 2 N. E. (2d) 940 (1936);

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<sup>4</sup> We believe that it was all these considerations and not as suggested in petitioner's brief (pp. 9-10), the single factor that the fair trade contracts fixed prices only on intrastate sales, which led the Circuit Court of Appeals to conclude with respect to the alleged conspiracy: "Its sole objective was control of domestic enterprise within the state, and it spent its direct and substantial force upon intrastate activities. Its effect, if any, on interstate commerce was indirect, insubstantial and incidental." (R. 95.)



*Johnson & Johnson v. Weissbard*, 121 N. J. Eq. 585,  
191 Atl. 873 (1937);

*Weco Products Company v. Reed Drug Co.*, 225  
Wis. 474, 274 N. W. 426 (1937).

We direct attention particularly to the *Seagram*, *Joseph Triner* and *Max Factor* cases. In each one the commodities in question had been produced outside the state. In each one they were distributed within the state either by a sales affiliate or an exclusive sales agent of the producer. In each case when the producer shipped its product in interstate commerce it did so with knowledge that upon retail sale in the state of destination the product would be subject to a fair trade contract. Yet in the *Joseph Triner* case the defendant did not even urge on appeal its claim that the state statute conflicted with the federal commerce power, and in the other two cases the contention was rejected by the state courts. The judgments in all three cases were affirmed by this court without consideration of the question. *Kunsman v. Max Factor & Co.*, 299 U. S. 198; *Old Dearborn Distributing Co. v. Seagram-Distillers Corp.*, and *McNeil v. Joseph Triner Corp.*, 299 U. S. 183.

These cases are clearly inconsistent with petitioner's contention that the alleged conspiracy falls within the condemnation of the Sherman Act simply because producers know that the products they ship will become subject to resale price contracts, if and when they are sold in Colorado. That this is the petitioner's position is not left to inference. Its brief quotes with approval the statement from *United States v. Food and Grocery Bureau of Southern California*, 43 F. Supp. 966, 972 (S. D. Cal.), dealing with a conspiracy by California merchants, that "It is the agreement on the price, in advance, which constitutes the violation \* \* \*."

<sup>5</sup> It is to be noted that the affirmance of this case in 139 F. (2d) 973 (C. C. A. 9th) and the opinion of the same Circuit Court of Appeals in *California Retail Grocers & Merchants Association v. United States*, 139 F. (2d) 978 (C. C. A. 9th), cert. denied 322 U. S.

The reason why the Government takes this position is clear. No less sweeping rule will condemn the conspiracy here alleged. Section 1 of the Colorado Fair Trade Act<sup>6</sup> authorizes resale price contracts by either the producer or distributor of trade marked or branded commodities. There is no requirement that the seller entering into such contracts be the owner of the trade mark, brand or name under which they are sold. It follows that every substantive feature of the claimed conspiracy could have been effected entirely within the State of Colorado by wholesalers and retailers without producer participation. Had the indictment alleged such a conspiracy, the only basis for jurisdiction under the Sherman Act would be the fact that the prices in the local retail market would tend to affect the volume of alcoholic beverages moving in interstate commerce. Yet the alleged producer participation in the conspiracy charged in the indictment did not result in any different or greater effect upon interstate commerce. In both cases it is indisputable that the substantial economic effect is entirely local. Any effect upon interstate commerce is secondary and insignificant. Unless this Court is prepared to hold that every local conspiracy with respect to prices of commodities which have moved in interstate commerce is a violation of the Sherman Act it must reject the petitioner's contention.

#### B. *The Boycott Cases.*

The Government cites cases in which conspiracies carried out through boycotts have been held violations of the Sher-

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729, do not rest on any such broad ground. The opinion in the former case points out (139 F. (2d) at 976) the existence of "direct and intentional discrimination against, and restraint of, out-of-state grocery products which competed with local products." The latter opinion stated (139 F. (2d) at 983) that "The purpose of the conspiracy was to 'stabilize' the entire trade in California in all sales, whether interstate or intrastate."

<sup>6</sup> 1937 Session Laws, Chapter 146, printed in full in the Appendix, *infra*, p. 39.

man Act and urges that the allegations of this indictment that refusal to patronize and boycott were part of the conspiracy bring it within the authority of those cases. They clearly have no application to the present situation.

As a preliminary matter it is necessary to analyze the allegations of the indictment with respect to refusal to patronize producers and wholesalers who do not enter into fair trade contracts and boycott of those who do not enforce them. Section 4 of the Colorado Fair Trade Act provides:

“Wilfully and knowingly advertising, offering for sale or selling any commodity at less than the price stipulated in any contract entered into pursuant to the provisions of this Act, *whether the person so advertising, offering for sale or selling is or is not a party to such contract*, is unfair competition and is actionable at the suit of any person damaged thereby.” (Italics ours.)

The effect of this provision is that if a producer enters into a fair trade contract with a single Colorado retailer it establishes minimum prices to be charged not only by that retailer but by all retailers who are notified of the restriction. Read in the light of this fact, the allegations of paragraph 31(d) of the indictment (R. 13-14) that the Package Association circulates bulletins and notices announcing the adoption of fair trade contracts, and that defendant retailers patronize only those producers and wholesalers who enter into fair trade contracts and withhold their patronage from those who fail to do so, lose much of their significance. The charge amounts to no more than that Colorado retailers refrain from purchasing beverages not subject to fair trade contracts.

Paragraph 31(f) of the indictment (R. 14) relates only to enforcement of contracts already entered into. It alleges an agreement by retailers, producers and wholesalers that retailers not observing the minimum prices fixed by such contracts shall be deprived of opportunity to purchase bev-

erages, and that retailers boycott producers and wholesalers who do not live up to this agreement. One obligation of sellers entering into fair trade contracts is to compel observance by the purchasers of the minimum prices fixed.<sup>7</sup> The Fair Trade Acts in their very essence call for uniform enforcement of the prices established. If a vendor may enforce observance of those prices by some retailers and not by others, then every retailer must hold his business life at the sufferance of the vendor. With these facts in mind, the courts have recognized that failure of a seller to police and enforce his fair trade contracts will render such contracts unenforceable. *Calvert Distillers Corp. v. Nussbaum Liquor Store*, 166 Misc. 342, 2 N. Y. S. (2d) 320 (Sup. Ct., 1938); *Calvert Distillers Corp. v. Stockman*, 26 F. Supp. 73, 76 (E. D. N. Y., 1939). The allegations of paragraph 31(f), like those of 31(d), therefore, amount to no more than the charge that Colorado retailers refrain from buying from Colorado wholesalers alcoholic beverages not subject to enforceable fair trade contracts. There is no claim of a refusal by respondents to enter into any transaction in interstate commerce. There is no allegation that producers boycotted or threatened wholesalers or that wholesalers boycotted or threatened producers.

The boycott cases cited by the petitioner presented a very different situation. *Fashion Originators' Guild, Inc. v. Federal Trade Commission*, 312 U. S. 457, involved a nation-wide conspiracy to eliminate from commerce, both interstate and intrastate, all garments made from copied

<sup>7</sup> A standard form of producer-retailer fair trade contract contains the following typical provision:

"(5) 'Manufacturer' in good faith will employ all appropriate means, which in the circumstances shall be reasonable, including legal proceedings if such other means fail, to prevent and to enforce the discontinuance of, any violation of said minimum retail price stipulations by any competitor of 'Retailer,' whether the person violating or threatening such violation is or is not a party to a fair trade contract with 'Manufacturer' covering said 'Commodities'." (CCH Trade Regulation Service, Vol. 2, par. 7021.)

designs. Garment manufacturers refused to sell, interstate or intrastate, to retailers who sold copied garments. Textile manufacturers refused to sell, interstate or intrastate, to garment manufacturers who sold to such retailers, again either in interstate or intrastate transactions. Interstate commerce was both an immediate instrument and a primary objective of the conspiracy.<sup>8</sup>

*Loewe v. Lawlor*, 208 U. S. 274, *Duplex Printing Press Company v. Deering*, 254 U. S. 443 and *Bedford Cut Stone Company v. Journeymen Stone Cutters' Assn.*, 274 U. S. 37, each involved a boycott in one state (or many states) designed to compel unionization of an industry in another state by suppressing interstate trade in its products. In those cases suppressing interstate commerce was a means deliberately adopted for effecting the ultimate purpose, not merely an incidental result. The local boycott served no local purpose. The immediate object was suppression of interstate commerce, the ultimate one to affect conditions in another state.

In this case there was an exclusively local aim, a desire to fix minimum profit margins on retail liquor sales in Colorado only. Pursuant to that local aim, Colorado retailers refrained from purchasing from Colorado wholesalers liquors not subject to satisfactory retail-price maintenance contracts. The effect, if any, upon interstate commerce was purely fortuitous and incidental, the result of local activities for local purposes.

Petitioner's argument that the alleged boycott was a restraint of interstate commerce violating the Sherman Act rests upon the same foundation as its similar contention

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<sup>8</sup> In *Eastern States Retail Lumber Dealers' Association v. United States*, 234 U. S. 600, retailers in several states combined to boycott manufacturers selling direct to consumers. Again, the boycott was made effective by refusal to consummate interstate transactions and was designed to eliminate direct sales, both interstate and intrastate. *Stevens Company v. Foster & Kleiser Co.*, 311 U. S. 255, likewise involved a refusal to engage in interstate transactions, directed at preventing persons not members of the combination from obtaining necessary materials in interstate commerce.

that local activities with respect to prices constitute such a restraint. Its position is that the alleged boycott of producers and wholesalers was a restraint of interstate commerce "since their market in Colorado is restricted when Colorado retailers refuse to buy their product" (Petitioner's Brief, pp. 26-27).<sup>9</sup> It argues that the local scope and purpose, the absence of intent to affect interstate commerce are not material.

Such a rule would extend federal jurisdiction under the Sherman Act to almost any local activity with respect to products which have moved or will move in interstate commerce. Concerted action by local consumer groups with reference to price, quality, or method of sale of articles produced in other states, may be the subject of action by the Department of Justice, or the basis for triple damage suits by manufacturers or merchants. To take a specific example, concerted action by consumers against the products of a manufacturer charging exorbitant prices through the medium of fair trade contracts would be a violation of the Sherman Act.

### III.

#### **A Construction of the Sherman Act to Cover the Activities Alleged in This Indictment Would Be An Unwarranted Encroachment Upon the Power of the States to Deal With Their Own Local Problems.**

In the preceding section of this brief we have pointed out that the question whether the economic effect of intrastate activities upon interstate commerce is so substantial as to

<sup>9</sup> *Local 167 v. United States*, 291 U. S. 293, does not support any such broad rule. That case involved a series of restraints, including interference with unloading of the commodities at railroad terminals, in part in another state, and with sales by and transportation from the commission men acting on behalf of interstate shippers at those terminals, to wholesalers in New York. See *Greater New York Live Poultry Chamber of Commerce v. United States*, 47 F. (2d) 156 (C. C. A. 2d). This Court characterized the entire conspiracy as one "to burden the free movement of live poultry into the metropolitan area." 291 U. S. at 297.

justify application of the Sherman Act can not be determined "without regard to the implications of our dual system of government". See *supra*, pages 11-12. Those implications have been referred to in somewhat general terms in the course of our argument. However, this case presents the problem not in any general way but sharply and specifically.

In its Fair Trade Act<sup>10</sup> and in its Unfair Practices Act<sup>11</sup> Colorado has given effect to a policy which imposes some limitations upon the free play of competitive forces. In its Liquor Code<sup>12</sup> and related legislation, Colorado has adopted a program for regulation of the liquor business in that state, which includes the substantial insulation of that business from interstate commerce (*supra*, pp. 6-7) and provides for the enforcement of resale price contracts by criminal penalties and expulsion from that business by license forfeiture. If the jurisdiction of the Federal Government under the Sherman Act is extended to the entirely local activities alleged in this indictment, the freedom of the state of Colorado to work out the policies embodied in these two groups of laws is substantially impaired.

#### A. *The Colorado Fair Trade and Unfair Practices Acts.*

The Colorado Fair Trade Act and Unfair Practices Act are typical of legislation widely adopted in the various states<sup>13</sup> for the purpose of eliminating certain competitive practices thought to be undesirable. The effect of the Fair Trade Act sufficiently appears from our previous discussion. The Unfair Practices Act prohibits locality discrimination and sales below cost for the purpose of injuring

<sup>10</sup> Printed in the Appendix, *infra*, pp. 39-41.

<sup>11</sup> 1937 Session Laws, Chapter 261, as amended, 1941 Session Laws, Chapter 227, printed in the Appendix, *infra*, pp. 41-46.

<sup>12</sup> Relevant provisions are printed in the Appendix, *infra*, pp. 33-38.

<sup>13</sup> Fair Trade Acts have been adopted in 45 states. Legislation similar to the Unfair Practices Act has been adopted in more than 25 states. See CCH Trade Regulation Service, Vol. 2, page 7503.



competitors and destroying competition (Sections 1 and 3). Cost is carefully defined to include the cost of doing business, with allowance for such items as interest, depreciation, credit losses, insurance and advertising (Section 3). Provision is made for use, in proving the costs of any person complained against under the statute, of established cost surveys of the trade or industry involved (Section 5). Section 9 of the Act authorizes suits for injunction and damages, not only by individuals but also by trade associations which may be affected.

Both statutes, therefore, limit some types of price competition and contemplate a substantial degree of stabilization of the retail mark-ups with which the indictment in this case is concerned. They authorize agreements or co-operative action to effectuate their purpose. They are a recognition of the fact that certain competitive practices may be used to destroy competition and produce monopoly, so that limitations on such practices promote rather than endanger the competitive system. The question of how far the agreements or cooperative action contemplated by the statutes may go before they in turn become a danger to the competitive system is one of degree upon which there may be legitimate differences of opinion.

The petitioner urges that the particular activities alleged in this indictment have passed the permissible limit and are not authorized by the Fair Trade Act and Unfair Practices Act. This is not the important issue. The real question is whether the determination that essentially local activities are or are not within limits set by local statutes should be made by state officials and state courts or by a department of the Federal Government and the federal courts. If federal jurisdiction under the Sherman Act extends to the exclusively local activities here involved, then the Federal Department of Justice is in a position to impose its ideas of sound practice under the state statutes, and, by instituting criminal or civil proceedings under the Sherman Act, to submit this question to the federal courts. The decision of those courts that a particular course of conduct violates

the Sherman Act would override any state court decision that similar conduct is within the terms of the state statute.

The nature of the issues that may be involved is illustrated by this indictment. Producers are included in the indictment as defendants, even though it is apparent that the initiators of the alleged conspiracy were local retailers who "persuade, induce, and compel" producers to participate in the conspiracy (Paragraph 31(b), R. 13). That participation consisted in the execution of fair trade contracts (Paragraph 31(b)), agreement on forms of such contracts and their revision (Paragraph 31(c) and (e), R. 13-14), and in enforcement of the contracts when made, including agreement that retailers not observing the prices established should be deprived of the opportunity to purchase the producers' products (Paragraph 31(f) and (g) R. 14). No details are given as to what the producers actually did, with what distributors arrangements may have been concluded, whether contracts were made through representatives of the retailers' association or with several retailers or wholesalers, or with a single retailer. A consideration of the practical operation of a system of fair trade contracts demonstrates that there is a wide variation in the types of conduct which might be covered by this indictment.

As already pointed out, under Section 4 of the Fair Trade Act, the minimum prices set in a single contract must be observed not only by the contracting retailer but by all other retailers who have notice of the restrictions. The producer can not make a series of contracts establishing different minimum prices, and thereby different mark-ups, adjusted to any variations in the costs of doing business as defined in the Unfair Practices Act and to varying desires as to margin of profit of different retailers. The producer must negotiate a single contract adjusted to the requirements of all dealers in Colorado. Strictly interpreted, the allegations of the indictment may mean no more than that each producer discussed prices with a single retailer, agreed on the prices suggested by the retailer, and promised to en-

force observance of those prices by all reasonable means. The allegations of the indictment may mean that each producer had such discussions with several retailers, three, or thirty, or three hundred. He may have negotiated with them separately, or held a joint meeting with several or many. He may have negotiated with a representative of several or with a representative of all. He may have dealt only with a wholesaler who in turn had discussed prices with several retailers. There is obviously room here for differences of opinion as to when permissible negotiation becomes forbidden agreement.<sup>14</sup> The answer reached will inevitably depend to a considerable extent upon the background of experience and the views as to the soundness of the legislation of those deciding the question. Knowledge of local conditions might lead a local administrator to a different conclusion than would be reached by one not familiar with the local situation. Officials who believe that resale price maintenance is undesirable will allow far less scope for negotiation than officials who approve of the statutory purpose. Where primarily local activities are involved, it should be the state officials and the state courts who answer such basic questions of policy. Federal policy should control only in those situations where interstate commerce is substantially involved, where the interest of the nation in such commerce outweighs the interest of the single state in effectuating its local policy.

<sup>14</sup> Other similar questions are raised by the indictment. The allegation (Paragraph 31(f)) that producers and wholesalers agreed with retailers that non-complying retailers be deprived of the opportunity to purchase their products raises the question whether such a course of conduct is a reasonable means of enforcing the contracts. The allegation that the defendant associations threatened to institute and instituted legal proceedings against non-complying retailers (Paragraph 31(f)) raises issues as to when joint pursuit of remedies provided by the Fair Trade Act ceases to be legitimate. The allegations that mark-ups and margins of profit were high, arbitrary and non-competitive (Paragraph 31(a), (b), (f)) must be tested in the light of the requirements of the Fair Trade Act and Unfair Practices Act that mark-ups on the same brands be non-competitive and that all mark-ups include proper allowances for cost of doing business.

The problem presented here bears definite analogies to another problem on which Mr. Justice Holmes expressed himself in a famous dissent:

"I must add one general consideration. There is nothing that I more deprecate than the use of the Fourteenth Amendment beyond the absolute compulsion of its words to prevent the making of social experiments that an important part of the community desires, in the insulated chambers afforded by the several States, even though the experiments may seem futile or even noxious to me and to those whose judgment I most respect." (*Truax v. Corrigan*, 257 U. S. 312, 344.)

It will likewise be unfortunate if, by making the reach of the Sherman Act for practical purposes all inclusive, experiments of the several states in connection with adoption and administration of legislation like that in question must be subordinated to the ideas of sound policy held by federal officials, and to the uniform rules established by the federal courts. We can see no practical justification for interference by the federal Government here. If the Colorado statutes are being violated or the privileges given by those statutes abused, Colorado has ample power to remedy the situation. There is no problem here of a far-reaching conspiracy with which a single state can not deal. Neither is there any problem here like that presented, for example, under the National Labor Relations Act, of sub-standard conditions in one state necessarily tending to bring down the standards in other states. We cannot see how the price of liquor to the Colorado consumer, or the extent of the profits of Colorado retailers can have appreciable repercussions on such prices and profits in states other than Colorado.

#### B. *The Colorado Liquor Code.*

The State of Colorado has adopted a comprehensive Liquor Code regulating every phase of the liquor traffic in

Colorado.<sup>15</sup> As pointed out in the first part of our argument, to facilitate its regulatory and tax program Colorado has included in the Liquor Code provisions which substantially insulate liquor traffic within the state of Colorado from interstate commerce (see *supra*, pp. 6-7). Colorado can enforce such insulation notwithstanding the Commerce Clause of the Constitution because of the specific terms of Section 2 of the Twenty-first Amendment, which provides:

“The transportation or importation into any State, Territory or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.”<sup>16</sup>

The purpose of this provision was to permit local regulation of local liquor problems, unfettered by the Commerce Clause of the Constitution. *Ziffrin, Inc. v. Reeves*, 308 U. S. 132, 138; *Indianapolis Brewing Co. v. Liquor Control Commission*, 305 U. S. 391, 394. “\* \* \* local, not national, regulation of the liquor traffic is now the general Constitutional policy.” (Concurring opinion of Mr. Justice Black, *Carter v. Virginia*, 321 U. S. 131, 138.)

Relevant to our present problem in addition to Colorado's policy of insulating local liquor traffic from interstate commerce is its encouragement of resale price maintenance in connection with liquor sales. By Section 3 of the Colorado Liquor Code it is made unlawful, and punishable by fine and imprisonment and forfeiture of license (Section 25, Appendix, p. 38) among other things,

“To wilfully and knowingly advertise or offer for sale or sell any malt liquors, vinous liquors, spirituous

<sup>15</sup> See Appendix, *infra*, pp. ———

<sup>16</sup> This provision is a simplified version of the Webb-Kenyon Act (March 1, 1913, 37 Stat. 699) which was enacted prior to adoption of the Eighteenth Amendment for the purpose of removing the barrier of the federal commerce power to regulation of the liquor trade by the several states. See *Clark Distilling Co. v. Western Maryland Ry. Co.*, 242 U. S. 311, containing a discussion of the legislative and judicial background of the Webb-Kenyon Act.

liquors and alcoholic beverages, whether the person so advertising, offering for sale, or selling, is or is not a party to such contract, at less than the price established in any contract entered into pursuant to the provisions of the Fair Trade Act, the same being Chapter 146, Session Laws of Colorado, 1937." (Session Laws 1941, page 520, Section 1, Amending Chapter 89, Section 17, 1935 Colorado Statutes Annotated.)

The purpose of including this provision in the Liquor Code is, of course, to insure the effectiveness of a device which prevents price cutting and destructive price wars which are considered demoralizing to the industry and the consumer alike. See *Reeves v. Simons*, 289 Ky. 793, 160 S. W. (2d) 149, 151 (1942).

Again, a determination that the Sherman Act is applicable to the local situation alleged in the indictment threatens the free development of these local policies with respect to the liquor traffic. The Government meets this suggestion by urging that nothing in the state law requires or even authorizes the activities alleged in the indictment. The answer, as in the case of the same argument with respect to the Fair Trade Act, is that the issue is not whether the acts of defendants were required or authorized by the state statutes, but whether jurisdiction to determine this question with respect to essentially local activities should be the responsibility of state authorities and state courts or of federal authorities and of federal courts. No action, legislative or administrative, has been taken by the Colorado authorities with respect to the activities here involved. They appeared by the Attorney General of Colorado in the Circuit Court of Appeals and in this Court<sup>17</sup> to urge that application of the Sherman Act to this local situation threatened the policies embodied in the Fair Trade and Unfair Practices Acts, and would jeopardize Colorado's control

<sup>17</sup> The Attorney General has requested that the brief he filed in opposition to the petition for writs of certiorari be considered also as a brief upon the merits.

over the intrastate liquor traffic. Admittedly, under the Twenty-first Amendment, the State of Colorado could require all liquor to be sold under fair trade contracts and could fix the mark-ups and margins of profit to be allowed. Why should the Federal Government say to the Colorado authorities, in effect, that they must adopt such specific legislation, regardless of whether the practical operation of the statutes already on the books produces similar results? The petitioner will no doubt say that the present system permits abuses which should be eliminated. Even if there are such abuses, so long as they affect the local situation they present a problem for solution by the State of Colorado, not by federal authority. If there are abuses only Colorado can effect a thorough reform. Application of the Sherman Act in particular cases can be only a palliative, more likely to delay than encourage action by the State if such action is needed.

A determination that the Sherman Act may be applied to this local situation can be justified only if there is the clearest showing of a close and substantial effect upon the interstate commerce which is the Federal Government's only legitimate concern. The allegations of this indictment make no such showing.



### CONCLUSION.

We urge that the judgment of the Circuit Court of Appeals should be affirmed.

Respectfully submitted,

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## APPENDIX.

## CONSTITUTION OF COLORADO.

## ARTICLE XXII.

On the thirtieth day of June, 1933, all statutory laws of the State of Colorado heretofore enacted concerning or relating to intoxicating liquors shall become void and of no effect; and from and after July 1st, 1933, the manufacture, sale and distribution of all intoxicating liquors, wholly within the State of Colorado, shall, subject to the Constitution and laws of the United States, be performed exclusively by or through such agencies and under such regulations as may hereafter be provided by statutory laws of the State of Colorado; but no such laws shall ever authorize the establishment or maintenance of any saloon.

## ARTICLE XXIV.

Sec. 2. There is hereby set aside, allocated and allotted to the Old Age Pension Fund sums and money as follows:

. . . .

(b) Beginning January 1, 1937, eighty-five per cent. of all net revenue accrued or accruing, received or receivable from taxes of whatever kind upon all malt, vinous, or spirituous liquor, both intoxicating and non-intoxicating, and license fees connected therewith.

COLORADO LIQUOR CODE.<sup>1</sup>

Section 1. This Act shall be deemed an exercise of the police powers of the State for the protection of the economic and social welfare, the health and peace and morals of the people of this State, but no provisions of this law shall ever be construed so as to authorize the establishment or maintenance of any saloon.

Sec. 2. On and after the effective date of this Act, it shall be lawful to manufacture and sell for beverage or medicinal purposes malt, vinous or spirituous liquors, subject to the terms, conditions, limitations and restrictions contained in this Act.

<sup>1</sup>1935 Session Laws, Ch. 142, Colorado Statutes Annotated (1935), Ch. 89, Art. 2, Sections 15 *et seq.*

Sec. 3. It shall be unlawful for any person:

(a) To manufacture, sell or possess for sale any malt, vinous or spirituous liquors, excepting in compliance with this Act.

• • • • •

(f) To manufacture for sale or sell malt, vinous or spirituous liquors unless licensed so to do as provided by this Act and unless all licenses required hereunder, of him or it, are in full force and effect.

(g) For any person other than one who holds a license under this Act to sell at retail any malt, vinous or spirituous liquors in sealed containers.

• • • • •

(k) To have in his possession any package, parcel or container not bearing the excise tax stamps as may be required by this Act, or any of the within described containers on which the excise tax has not been paid to buy or re-use or to sell, transfer or give to any other person any alcoholic liquor container which has once been used on which is attached state excise stamps whether cancelled or not.

• • • • •

(m) For any retailer or consumer, to buy any vinous or spirituous liquor from any person not licensed to sell and deliver at wholesale or retail or serve the same as provided by this Act.

• • • • •

(r) For any person, except a person licensed to sell at wholesale hereunder, or except as otherwise expressly provided herein, to buy the State excise stamps provided for in this Act from the State Treasurer, or sell or offer for sale any such stamp except such as is purchased directly from the State Treasurer, by such person, or to re-use any state excise stamp which has been once attached to a bottle or container, or to affix a state excise stamp over any federal excise stamp or over any label.

• • • • •

(t) To wilfully and knowingly advertise or offer for sale or sell any malt liquors, vinous liquors, spirituous liquors and alcoholic beverages whether the person so advertising, offering for sale or selling is or is not a party to such con-

tract, at less than the price stipulated in any contract entered into pursuant to the provisions of the Fair Trade Act, the same being Chapter 146, Session Laws of Colorado, 1937. (*Subsection (t) as added by L. 1941, Chap. 160, approved and effective April 15, 1941.*)

• • • •

Sec. 6. The Secretary of State shall be the Executive in charge of the enforcement of the terms and provisions of this article, and as the State Licensing Authority his duties and authority shall be as follows:

(a) To grant or refuse licenses for the manufacture and sale of malt, vinous and spirituous liquors, as provided for by law, and to suspend or revoke such licenses upon a violation of any law or any rule or regulation adopted by him in compliance with this Act.

(b) To make such general rules and regulations and such special rulings and findings as he may deem necessary for the proper regulation and control of the manufacture, sale and distribution of malt, vinous or spirituous liquors and the enforcement of this article, in addition thereto, and not inconsistent therewith, and may alter, amend, repeal and publish the same from time to time.

And not by way of limitation such rules and regulations may cover the following subjects: Compliance with, enforcement or violation of any law, rule or regulation; specifications of duties of officers and employees under him, instructions for other licensing authorities and law enforcing officers; all forms necessary or convenient in the administration of this Article; inspections, investigations, searches, seizures and such activities as may become necessary from time to time; sales on credit; limitation of the number of licensees as to any area or vicinity; misrepresentation, unfair practices; unfair competition; \* \* \* practices unduly designed to increase the consumption of alcoholic beverages; and such other matters whatsoever as he may deem necessary and fair, impartial, stringent and comprehensive administration of this article, but nothing herein shall be construed as delegating unto the licensing authority the power to fix prices. The licensing authority shall make no rule which would abridge the right of any licensee to fairly, honestly and lawfully advertise the place

of business of or the commodities sold by such licensee. All such rules shall be reasonable and just.

. . . . .

(e) To report to the Governor respecting the administration of this article, and to make such recommendations in regard to legislation and the administration of the article as said State Licensing Authority shall deem proper and necessary.

\* \* \* (Sec. 6 as amended by L. 1941, Chap. 159, approved and effective May 6, 1941.)

. . . . .

Sec. 10. In addition to any other penalties prescribed by this Act, any licensing authority hereunder shall have power, on his or its own motion or on complaint, after investigation and public hearing, at which the licensee shall be afforded an opportunity to be heard, to suspend and/or revoke any license, issued by such authority for any violation by the licensee or by any of the agents, servants or employees of such licensee of the provisions of this Act, or of any of the rules or regulations authorized hereunder, or of any of the terms, conditions or provisions of the license issued by such authority.

. . . . .

Sec. 11. No license provided by this Act shall be issued to or held by:

. . . . .

(c) Any person who has been convicted of a felony or of any violation of any liquor law in any federal or state court of record in the State of Colorado.

. . . . .

Sec. 17. (a) *Wholesaler's Liquor License*. Every person selling vinous or spirituous liquors at wholesale shall pay to the State Treasurer an annual license fee of One Thousand Dollars (\$1,000.00) payable in advance.

(b) *Wholesaler's Beer License*. Every person selling malt liquors at wholesale shall pay to the State Treasurer an annual license fee of Five Hundred Dollars (\$500.00) payable in advance; provided, that each license shall be separate and distinct each from the other but any person, firm, corporation, co-partnership may secure both licenses for the payment in advance of both fees.

(c) Said license or licenses shall entitle the licensee or licensees to:

(1) Maintain and operate two warehouses and one sales room in this state to handle products so described in the above license or licenses, the same to be denominated a wholesale wine and liquor store or a wholesale beer store or both, if required licenses have been provided.

(2) Take orders for vinous and spirituous liquors at any place and deliver vinous and spirituous liquors on orders previously taken to any place; provided, the said licensee has procured a wholesale wine and liquor license; provided, further, that the place where orders are taken and delivered is a place regularly licensed pursuant to the provisions of this Act.

(3) Take orders for malt liquors at any place and deliver malt liquors on orders previously taken to any place; provided the said licensee has procured a wholesale beer license; provided further, that the place where orders are taken and delivered is a place regularly licensed pursuant to the provisions of this Act.

(4) The provisions of this section shall not apply to any brewer licensed under this Act.

Sec. 18. Retail liquor stores as defined in this Act shall be licensed only to sell malt, vinous and spirituous liquors in sealed containers not to be consumed at the place where sold. Malt, vinous and spirituous liquors in sealed containers shall not be sold at retail other than in retail liquor stores, except as provided in Section 18-A of this Act.

Sec. 23. (a) An excise tax of three cents (3¢) per gallon or fraction thereof on all malt liquors, three cents per quart or fraction thereof on all vinous liquors containing 14% or less of alcohol, and six cents per quart or fraction thereof on all vinous liquors containing more than 14% of alcohol by volume, and twenty cents per pint or fraction thereof on all spirituous liquors is hereby imposed, and shall be collected on all such respective liquors sold, offered for sale, or used in this state; provided, that upon the same liquors only one such tax shall be paid in this state. The manufacturer thereof, or the first licensee receiving alcoholic liquors in this state, if shipped from without the state, shall be primarily liable for such tax; \* \* \*

(b) The excise tax herein provided for shall be paid to the State Treasurer immediately upon delivery of the stamps, as provided for herein.

(c) All alcoholic liquors manufactured in this state, or sold therein, shall bear on the said container or containers, an excise stamp to be provided by the State Licensing Authority, which said stamp shall be affixed to all alcoholic liquors manufactured within this state by the manufacturer thereof before sale, or before being offered for sale, and all alcoholic liquors imported into the state immediately, upon entry therein, be affixed with the said excise stamp before being sold or offered for sale within the said state, and in accordance with the rules and regulations which may be promulgated by the State Licensing Authority, and provided also that all alcoholic liquors within the state, on the effective date of this Act, shall within a reasonable time thereafter, bear an excise stamp in the proper amount as provided herein.

Sec. 25. Violations and Penalty. Any person violating any of the provisions of this Act, or any of the rules and regulations authorized and adopted under it shall be deemed guilty of a misdemeanor and upon conviction shall be fined in the sum of not more than Five Thousand Dollars (\$5,000.00) for each offense, or may be punished by confinement in the county jail for a term of not more than one year, or by both such fine and imprisonment, and the court trying such offense may decree that any license theretofore issued under the provisions of this Act or of any law relating to the sale of malt, vinous or spirituous liquors to such person operating the place of business in which said offense was committed be revoked, and may decree that no license for the sale of malt, vinous or spirituous liquors shall ever thereafter be issued to any such person convicted of such violation.

The penalties provided in this section shall not be affected by the penalties provided in any other section or sections of this Act but shall be construed to be in addition to any and all other penalties.

• • • • •



## COLORADO FAIR TRADE ACT<sup>2</sup>

An Act to protect trade-mark owners, distributors and the public against injurious and uneconomic practices in the distribution of articles of standard quality under a distinguished trade-mark, brand or name.

*Be It Enacted by the General Assembly of the State of Colorado:*

Section 1. No contract relating to the sale or resale of a commodity which bears, or the label or container of which bears, the trade-mark, brand or name of the producer or distributor of such commodity, and which commodity is in free and open competition with commodities of the same general class produced or distributed by others shall be deemed in violation of any law of the State of Colorado by reason of any of the following provisions which may be contained in such contract:

(a) That the buyer will not resell such commodity at less than the minimum price stipulated by the seller.

(b) That the buyer will require of any dealer to whom he may resell such commodity an agreement that he will not, in turn, resell at less than the minimum price stipulated by the seller.

Such provisions in any contract shall be deemed to contain or imply conditions that such commodity may be resold without reference to such agreement in the following cases:

(a) In closing out the owner's stock for the bona fide purpose of discontinuing dealing in any such commodity and plain notice of the fact is given to the public; provided the owner of such stock shall give to the producer of such commodity, or to the distributor, from whom the same was purchased, prompt and reasonable notice in writing of his intention to close out said stock, and an opportunity to purchase such stock at the original invoice price.

(b) When the trade-mark, brand or name is removed or wholly obliterated from the commodity and is not used or directly or indirectly referred to in the advertisement or sale thereof.

<sup>2</sup> 1937 Session Laws, Ch. 146.

(c) When the goods are damaged or deteriorated in quality and plain notice of the fact is given to the public in the advertisement and sale thereof, such notice to be conspicuously displayed in all advertisements.

(d) By any officer acting under the orders of any court.

Sec. 2. This Act shall not apply to any contract or agreement between or among producers or between or among wholesalers or between or among retailers as to sale or resale prices.

Sec. 3. The following terms, as used in this Act, are hereby defined as follows:

(a) "Commodity" means any subject of commerce.

(b) "Producer" means any grower, baker, maker, manufacturer, bottler, packer, converter, processor, or publisher.

(c) "Wholesaler" means any person selling a commodity other than a producer or retailer.

(d) "Retailer" means any person selling a commodity to consumers for use.

(e) "Person" means an individual, a corporation, a partnership, an association, a joint-stock company, a public trust, or any unincorporated organization.

Sec. 4. Wilfully and knowingly advertising, offering for sale or selling any commodity at less than the price stipulated in any contract entered into pursuant to the provisions of this Act, whether the person so advertising, offering for sale or selling is or is not a party to such contract, is unfair competition and is actionable at the suit of any person damaged thereby.

Sec. 5. If any provision of this Act is declared unconstitutional, it is the intention of the Legislature that the remaining portions thereof shall not be affected, but that such remaining portions remain in full force and effect, but no part of this act shall prevent the payment of patronage refunds by cooperative agencies or associations existing and operating under the laws of this State.

Sec. 6. This Act may be known and cited as the "Fair Trade Act."

Sec. 7. The General Assembly hereby finds, determines and declares this Act to be necessary for the immediate preservation of the public peace, health and safety.

Sec. 8. In the opinion of the General Assembly an emergency exists; therefore, this Act shall take effect and be in force from and after its passage.

### COLORADO UNFAIR PRACTICES ACT.<sup>3</sup>

AN ACT relating to unfair competition and discrimination, making certain unfair and discriminatory practices unlawful, defining the duties of the Attorney General in regard thereto, declaring certain contracts illegal and forbidding recovery thereon, providing for actions to enjoin unfair competition and discrimination and to recover damages therefor, making the violation of the provisions of this Act a misdemeanor and providing penalties, and to repeal chapter 187, Session Laws of Colorado, 1933.

*Be It Enacted by the General Assembly of the State of Colorado:*

Section 1. It shall be unlawful for any person, firm, or corporation, doing business in the State of Colorado and engaged in the production, manufacture, distribution or sale of any commodity, or products, or service or output of a service trade, of general use or consumption, or the sale of any merchandise or product by any public utility, with the intent to destroy the competition of any regular established dealer in such commodity, product or service, or to prevent the competition of any person, firm, private corporation, or municipal or other public corporation, who or which in good faith, intends and attempts to become such dealer, to discriminate between different sections, communities or cities or portions thereof, or between different locations in such sections, communities, cities or portions thereof in this state, by selling or furnishing such commodity, product or service at a lower rate in one section, community or city, or any portion thereof, or in one location in such section, community, or city or any portion thereof, than in another after making allowance for difference, if any, in the grade or quality, quantity and in the

<sup>3</sup> 1937 Session Laws, Ch. 261 as amended, 1941 Session Laws, Ch. 227.

actual cost of transportation from the point of production, if a raw product or commodity, or from the point of manufacture, if a manufactured product or commodity. Motion picture films when delivered under a lease to motion picture houses shall not be deemed to be a commodity or product of general use, or consumption, under this Act. Nothing in this Act contained shall be construed to affect or apply to any service or product sold, rendered or furnished by any public utility, the sale, rendition or furnishing of which is subject to regulation by the Colorado Public Utilities Commission or by any municipal regulatory body. This act shall not be construed to prohibit the meeting in good faith of a competitive rate. The inhibition hereof against locality discrimination shall embrace any scheme of special rebates, collateral contracts or any device of any nature whereby such discrimination is, in substance or fact, effected in violation of the spirit and intent of this Act.

Sec. 2. Any person who, either as director, officer or agent of any firm or corporation or as agent of any person, violating the provisions of this Act, assists or aids, directly or indirectly, in such violation shall be responsible therefor equally with the person, firm or corporation for whom or which he acts.

In the prosecution of any person as officer, director or agent, it shall be sufficient to allege and prove the unlawful intent of the person, firm or corporation for whom or which he acts.

Sec. 3. It shall be unlawful for any person, partnership, firm, corporation, joint stock company, or other association engaged in business within this State, to sell, offer for sale or advertise for sale any article or product, or service or output of a service trade for less than the cost thereof to such vendor, or give, offer to give or advertise the intent to give away any article or product, or service or output of a service trade for the purpose of injuring competitors and destroying competition and he or it shall also be guilty of a misdemeanor, and on conviction thereof shall be subject to the penalties set out in Section 11 of this Act for any such act.

(a) The term "cost" as applied to production is hereby defined as including the cost of raw materials, labor and

all overhead expenses of the producer; and as applied to distribution "cost" shall mean the invoice or replacement cost, whichever is lower, of the article or product to the distributor and vendor plus the cost of doing business by said distributor and vendor.

(b) The "cost of doing business" or "overhead expense" is defined as all costs of doing business incurred in the conduct of such business and must include without limitation the following items of expense: labor (including salaries of executives and officers), rent, interest on borrowed capital, depreciation, selling cost, maintenance of equipment, delivery costs, credit losses, all types of licenses, taxes, insurance and advertising.

Sec. 4. In establishing the cost of a given article or product to the distributor and vendor, the invoice cost of said article or product purchased at a forced, bankrupt, close-out sale, or other sale, outside of the ordinary channels of trade may not be used as a basis for justifying a price lower than one based upon the replacement cost as of date of said sale of said article or product replaced through the ordinary channels of trade, unless said article or product is kept separate from goods purchased in the ordinary channels of trade and unless said article or product is advertised and sold as merchandise purchased at a forced, bankrupt, closeout sale, or by means other than through the ordinary channels of trade, and said advertising shall state the conditions under which said goods were so purchased and the quantity of such merchandise to be sold or offered for sale.

Sec. 5. In any injunction proceeding or in the prosecution of any person as officer, director or agent, it shall be sufficient to allege and prove the unlawful intent of the person, firm or corporation for whom or which he acts. Where a particular trade or industry, of which the person, firm or corporation complained against is a member, has an established cost survey for the locality and vicinity in which the offense is committed, the said cost survey shall be deemed competent evidence to be used in proving the costs of the person, firm or corporation complained against within the provisions of this act.

Sec. 6. The provisions of Section 3, 4, and 5 shall not apply to any sale made:

(a) In closing out in good faith the owner's stock or any part thereof for the purpose of discontinuing his trade in any such stock or commodity, and in the case of the sale of seasonal goods or to the bona fide sale of perishable goods to prevent loss to the vendor by spoilage or depreciation, provided notice is given to the public thereof;

(b) When the goods are damaged or deteriorated in quality, and notice is given to the public thereof;

(c) By an officer acting under the orders of any court;

(d) In an endeavor made in good faith to meet the legal prices of a competitor as herein defined selling the same article or product, or service or output of a service trade, in the same locality or trade area.

Any person, firm or corporation who performs work upon, renovates, alters or improves any personal property belonging to another person, firm or corporation, shall be construed to be a vendor with (within) the meaning of this Act.

Sec. 7. The secret payment or allowances of rebates, refunds, commissions, or unearned discounts, whether in the form of money or otherwise, or secretly extending to certain purchasers special services or privileges not extended to all purchasers purchasing upon like terms and conditions, to the injury of a competitor and where such payment or allowance tends to destroy competition, is an unfair trade practice and any person, firm, partnership, corporation, or association resorting to such trade practice shall be deemed guilty of a misdemeanor and on conviction thereof shall be subject to the penalties set out in section 11 of this Act.

Sec. 8. Any contract, express or implied, made by any person, firm or corporation in violation of any of the provisions of Sections 1 to 7, inclusive, of this Act is declared to be an illegal contract and no recovery thereon shall be had, provided, no part of this Act shall prevent the payment of patronage refunds by cooperative agencies or associations existing and operating under the laws of this State.

Sec. 9. Any person, firm, private corporation or municipal or other public corporation, or trade association, may maintain an action to enjoin a continuance of any act or

acts in violation of sections 1 to 7, inclusive, of this Act and, if injured thereby, for the recovery of damages. If, in such action, the court shall find that the defendant is violating or has violated any of the provisions of sections 1 to 7, inclusive, of this Act, it shall enjoin the defendant from a continuance thereof. It shall not be necessary that actual damages to the plaintiff be alleged or proved. In addition to such injunction [injunctive] relief, the plaintiff in said action shall be entitled to recover from the defendant three times the amount of the actual damages if any, sustained.

Sec. 10. Any person, firm, or corporation, whether as principal, agent, officer or director, for himself, or itself, or for another person, or for any firm or corporation, or any corporation, who or which shall violate any of the provisions of section 1 to 7, inclusive, of this Act, is guilty of a misdemeanor for each single violation and upon conviction thereof, shall be punished by a fine of not less than one hundred dollars (\$100.00) nor more than one thousand dollars (\$1,000.00), or by imprisonment not exceeding six (6) months or by both said fine and imprisonment, in the discretion of the court.

Sec. 11. If any section, sentence, clause or phrase of this Act is for any reason held to be unconstitutional, such decision shall not affect the validity of the remaining portions of the Act. The Legislature hereby declares that it would have passed this Act, and each section, sentence, clause or phrase thereof, irrespective of the fact that any one or more other sections, sentences, clauses or phrases be declared unconstitutional. The remedies herein prescribed are cumulative.

Sec. 12. The Legislature declares that the purpose of this Act is to safeguard the public against the creation or perpetuation of monopolies and to foster and encourage competition, by prohibiting unfair and discriminatory practices by which fair and honest competition is destroyed or prevented. This act shall be literally construed that its beneficial purposes may be subserved.

Sec. 13. This act shall be known and designated as the "Unfair Practices Act."



Sec. 14. Chapter 187 of the Session Laws of Colorado, 1933, is hereby repealed.

Sec. 15. The General Assembly hereby finds, determines and declares this Act to be necessary for the immediate preservation of the public peace, health and safety.

Sec. 16. In the opinion of the General Assembly an emergency exists; therefore, this act shall take effect and be in force from and after its passage.





**FILE COPY**

**Nos. 523-530**

Office - Supreme Court, U. S.

**FILED**

**OCT 26 1944**

**CHARLES ELMORE OROPLEY  
CLERK**

**IN THE**

**Supreme Court of the United States**

**OCTOBER TERM, 1944**

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**UNITED STATES OF AMERICA, PETITIONER,**

**v.**

**FRANKFORT DISTILLERIES, INC.; NATIONAL DISTILLERS PRODUCTS CORPORATION; BROWN FORMAN DISTILLERS CORPORATION; HIRAM WALKER, INCORPORATED; SCHENLEY DISTILLERS CORPORATION; SEAGRAM-DISTILLERS CORPORATION; MCKESSON & ROBBINS, INCORPORATED; J. E. SPEEGLE.**

---

**BRIEF OF THE STATE OF COLORADO, AMICUS CURIAE,  
IN OPPOSITION TO PETITION FOR CERTIORARI.**

---

**GAIL L. IRELAND,  
Attorney General,**

**GEORGE K. THOMAS,  
Assistant Attorney General  
of the State of Colorado,**

**State Capitol,  
Denver 2, Colorado.**

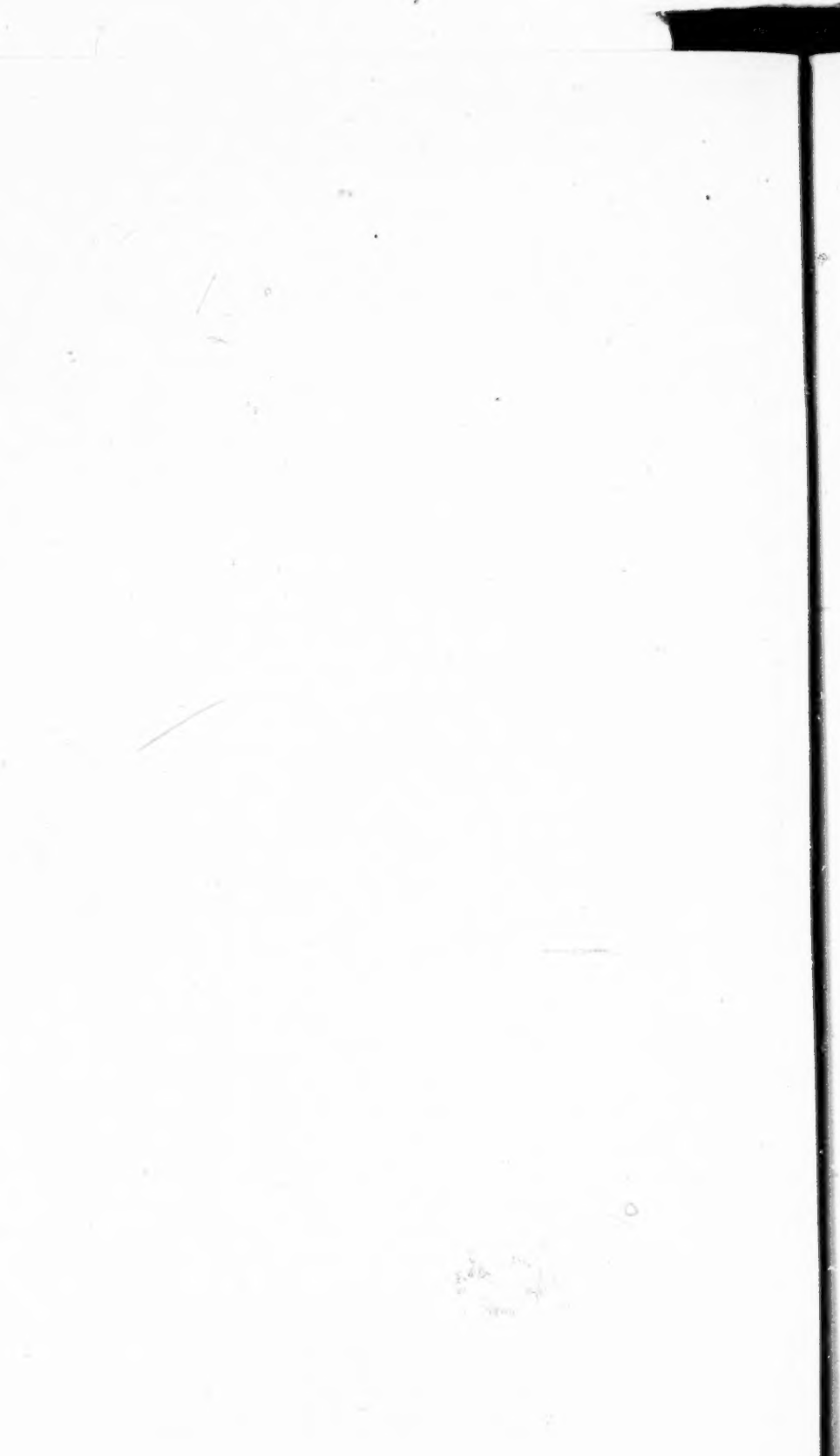


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BRIEF OF THE STATE OF COLORADO, AMICUS CURIAE,  
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---

The application for a Petition for Writ of Certiorari herein pending has been filed by the United States of America. The petition is a result of the Tenth Circuit Court of Appeal's decision and judgment in the case at bar wherein the United States of America sought to prosecute the Brown Forman Distillers Corporation and various other Distillers and local wholesale and retail liquor dealers

doing business in the State of Colorado, on a charge of violating the Federal "Anti-Trust" Laws. The Circuit Court of Appeals, among other things, concluded that the activities of the defendants as pleaded, was one necessarily intended to involve and affect only intrastate transactions and that it spent its direct and substantial force upon intrastate activities and that its effect, if any, on interstate commerce was indirect, insubstantial and incidental. The State of Colorado intervened as *Amicus Curiae* because of the direct effect of the prosecution upon the state's Liquor Code and Fair Trade Practice Act.

For inasmuch as the Attorney General of the State of Colorado has filed his brief and argument in the Circuit Court on behalf of the State of Colorado, and that Court has taken cognizance of the interests of the State in the outcome of the controversy at bar, we believe it appropriate and necessary on behalf of the State, to oppose the issuance of certiorari by this Honorable Court and request that it let the decision of the Tenth Circuit Court of Appeals stand as a final determination of the issues.

We have no further purpose or interest in this controversy between private individuals and the Federal Government. Our concern is solely over the proper line of demarkation between the authority of the federal government and the State of Colorado as it affects the system of our state control over intoxicating liquors which our citizens and legislature have chosen to adopt. We believe that the state's power to control sales of intoxicants within its borders is a purely local matter and that any decision to the contrary would disrupt, not only our state liquor code but the tax structure built upon it, 85% of which goes toward the payment of Old Age Pensions in Colorado. Accordingly we will confine ourselves to a restatement of the principal proposition advanced in the Circuit Court, namely:

**THE STATE OF COLORADO HAS ENACTED SPECIFIC  
LEGISLATION REGULATING ALL LIQUOR SALES  
WITHIN ITS BORDERS.**

Article XXII of the Colorado Constitution repeals the state prohibition law. That article was adopted by vote of the people at the General Election on November 8, 1932. Not being self-executing, however, it was necessary for the State of Colorado to enact a new code of liquor laws which in substantially its present form was enacted the following year and now appears as Chapter 89, Colorado Statutes Annotated, 1935. The Code sets up complete machinery for licensing and regulating the sale, use and consumption of liquors, wines and beer, both wholesale and retail, within the State of Colorado, and also imposes and levies an excise tax thereon, evidenced by "liquor stamps", which can only be sold to a manufacturer or a wholesaler. By that same token the Code makes the manufacturer or wholesaler liable for the payment of the tax in the first instance and it is unlawful for them to deliver any liquors, wines, or beer to the retailers for retail sale and disposition without first affixing the stamps to the containers or packages. Peculiarly enough, the stamps must remain uncanceled, the cancellation being left to the retail dealer or dispenser immediately upon his receipt of the article. We mention this system to illustrate the fact, that it is through control of the sale of liquor by the manufacturer or wholesaler that the State is able to enforce its police regulations and to collect its current excise revenue.

In addition to the Liquor Code, the State Legislature in 1937, enacted two statutes designed to stabilize retail prices on commodities throughout the State and to protect the retail trade from unscrupulous and destructive price cutting practices. We refer to these statutes as Chapter 146, Session Laws of Colorado, 1937, known as "Colorado Fair Trade Act" and Chapter 261, known as "Colorado Unfair Practices Law". Under the Fair Trade Act, it is made lawful for a dealer to contract, among other things, that he will not resale a commodity at less than

“the minimum price stipulated by the seller”, and the commodity affected is defined as “any subject of commerce”. The Colorado Unfair Practices law, *supra*, among other things, makes it unlawful for retailers, 1: To sell or offer to sell a commodity with an intent to destroy competition, and 2: To sell, offer for sale at less than cost or to give away an article to injure competitors and destroy competition.

As heretofore pointed out these Acts were deliberately designed to fix and stabilize minimum retail prices of commodities within the State of Colorado. We assume that the right of the State of Colorado to enact the same, as well as the fact that prices so fixed upon commodities in the field of local retail sales are excluded from the operation of the Sherman Act, has been too well established to require further argument.

In 1941, the Colorado Legislature passed an Act amending Section 17 of Chapter 89, 1935 Colorado Statutes Annotated (The State Code, *supra*), by addition of a new sub-section as follows:

“(t) To wilfully and knowingly advertise or offer for sale or sell any malt liquors, spirituous liquors and alcoholic beverages whether the person so advertising, offering for sale or selling is or is not a party to such contract, *at less than the price stipulated in any contract entered into pursuant to the provisions of the Fair Trade Act, the same being Chapter 146, Session Laws of Colorado, 1937.*” (Italics are ours.)

(Sec. 1, Ch. 160, S. L. Colo. 1941.)

The 1941 amendment, *supra*, was enacted so as to clarify any doubt but that retail liquor sales in the State of Colorado could lawfully be made the subject of fair trades contract for minimum price and thus bring the retail liquor dealers within the provisions of the Fair Trades Acts, the same as the druggist or other retail merchant

handling and dispensing imported standard branded products.

We deem it advisable to call the Court's attention to the fact that in Colorado, liquor sales constitute one of the chief sources of revenue, earmarked for the benefit of our old age pensioners and the system in Colorado providing for the collection of that revenue is built upon the absolute control by the state over manufacturers within the state and the wholesal importers. They are the only ones who can buy and affix the state liquor stamps. The state looks to and holds the wholesaler licensed by it accountable for the payment of the state excise tax thereon. Colorado, therefore, has a pecuniary as well as a regulatory concern in every wholesale sale of liquor imported within its borders. The retail purchases by the consumer from retail dealers who must purchase their stock from a Colorado licensed wholesaler to constitute a legal sale in Colorado, are wholly intra-state transactions.

We believe it was this phase of the factual presentation to the Circuit Court as well as the fact that the retail price maintenance applied to liquor no longer in interstate commerce—liquor which is, in fact, insulated from interstate commerce by provisions of Colorado law—which impelled the Court to deny jurisdiction of the Federal anti-trust laws over the controversy at bar. Any other interpretation would nullify the "Colorado Fair Trade Act" and its "Unfair Practice Law" which govern and regulate liquor sales within our borders and deny to Colorado the regulatory power granted the states under the 21st Federal Amendment.

#### CONCLUSION.

For reference we are supplementing this statement with an appendix consisting of copies of the pertinent portions of the Colorado Liquor Code and Regulations, setting up the machinery for the importation of intoxicants into Colorado, the taxing thereof, and the regulation and policing of local retail sales to the ultimate consumers. As al-

ready stated the state's prime concern is the effect of the controversy at issue upon its control over the article itself and the sale and traffic after the intoxicating beverages have been delivered within our borders for use and consumption in this state. The final judgment of the Circuit Court holds that these transactions as pleaded are wholly intrastate activities and that the second count of the Indictment "is completely barren of any allegations of fact effectively charging that the combination and agreement was one directly and substantially to restrict or burden the free and untrammelled flow of interstate commerce." The Court held also that the agreement "as pleaded was one necessarily intended to affect only intrastate activities." Such local liquor activities come within the provision of the Colorado laws. Any other conclusion would jeopardize our control over the intrastate liquor traffic and wreck the principal source of revenue for our Pension Fund.

The liquor sale regulations of the State of Colorado include specific requirements that intoxicating liquors produced outside of Colorado shall be the sole and exclusive property of the duly licensed Colorado wholesaler *when it crosses the Colorado State line* (see Regulation 12-C of the Appendix). *Such liquor must come to rest in the warehouse of the wholesaler for the purpose of having state excise stamps affixed before it can be sold or offered for sale within the state.* Retailers can purchase such liquor only from licensed Colorado wholesalers within the state. No wholesaler may own directly or indirectly any interest in a retailer nor may a retailer have any such interest in the wholesaler. We cannot visualize a situation in which the field of retail trade or complete local control is more definitely separated from interstate commerce.

We submit, therefore, that the final decision and judgment of the Circuit Court rendered in the case at bar is based upon the factual finding that no interstate commerce is involved. That such findings should not be disturbed and that there being no error of law appearing from the record

in the judgment and determination of the Circuit Court of Appeals in applying the law thereto, the writ of certiorari should and ought to be denied.

Respectfully submitted,

GAIL L. IRELAND,  
*Attorney General,*  
*of the State of Colorado.*

GEORGE K. THOMAS,  
*Assistant Attorney General*  
*of the State of Colorado.*

\* \* \* \* \*

**APPENDIX.**

**ARTICLE 2, LIQUOR CODE OF 1935.**

(Chap. 89, Colo. Stat. Ann. 1935)

SECTION 15. This Act shall be deemed an exercise of the police powers of the State for the protection of the economic and social welfare, the health and peace and morals of the people of this State, but no provisions of this law shall ever be construed so as to authorize the establishment or maintenance of any saloon.

SECTION 16. On and after the effective date of this Act, it shall be lawful to manufacture and sell for beverage or medicinal purposes malt, vinous or spirituous liquors, subject to the terms, conditions, limitations and restriction contained in this Act.

SECTION 17. It shall be unlawful for any person :

(a) To manufacture, sell or possess for sale any malt, vinous or spirituous liquors, excepting in compliance with this Act.

(b) • • •

(c) • • •

(d) • • •

(e) • • •



(f) To manufacture for sale or sell malt, vinous or spirituous liquors unless licensed so to do as provided by this act and unless all licenses required hereunder, of him or it, are in full force and effect.

(g) For any person other than one who holds a license under this act to sell at retail any malt, vinous or spirituous liquors in sealed containers.

(h) To manufacture or sell at retail malt, vinous or spirituous liquors except in the permanent location specifically designated in the license for such manufacture and sale, or in such place to which a licensee may desire to move his or its permanent location. Such licensee may move his or its permanent location to any other place in the same city, town, or city and county for which the license was originally granted, or in the same county if such license was granted for a place outside the corporate limits of any city, town, or city and county, but it shall be unlawful to sell any malt, vinous or spirituous liquor at any such place until permission so to do shall be granted by all the licensing authorities herein provided for.

• • • • •

(i) For any person, the holder of a license to sell malt, vinous or spirituous liquors, to keep in his possession or upon the premises for which license is granted, any malt, vinous or spirituous liquors, the sale of which is not permitted by said license.

(j) • • •

(k) To have in his possession any package, parcel or container not bearing the excise tax stamps as may be required by this Act, or any of the within described containers on which the excise tax has not been paid to buy or re-use or to sell, transfer or give to any other person any alcoholic liquor container which has once been used on which is attached state excise stamps whether cancelled or not.

(l) To offer for sale or solicit any order for vinous or spirituous liquors in person at retail, except within his duly licensed establishment.

(m) For any retailer or consumer, to buy any vinous or spirituous liquor from any person not licensed to sell and deliver at wholesale or retail or serve the same as provided by this Act.

(n) • • •

(o) • • •

(p) • • •

(r) For any person, except a person licensed to sell at wholesale hereunder, or except as otherwise expressly provided herein, to buy the State excise stamps provided for in this Act from the State Treasurer, or sell or offer for sale any such stamp except such as is purchased directly from the State Treasurer, by such person, or to re-use any State excise stamp which has been once attached to a bottle or container, or to affix a State excise stamp over any Federal excise stamp or over any label.

(s) • • •

(t) To wilfully and knowingly advertise or offer for sale or sell any malt liquors, vinous liquors, spirituous liquors and alcoholic beverages whether the person so advertising, offering for sale or selling is or is not a party to such contract, at less than the price stipulated in any contract entered into pursuant to the provisions of the Fair Trade Act, the same being Chapter 146, Session Laws of Colorado, 1937. (Sub-sec. (t), Ref. Ch. 160, S. L. C. 1941.)

SECTION 18. Definitions--as used in this Act.

• • • • •

(p) "To sell" or "sale" means and includes any of the following: To exchange, barter or traffic in; to solicit or receive an order for except through a licensee licensed

hereunder; to keep or expose for sale; to serve with meals; to deliver for value or in any way other than gratuitously; to peddle, to possess with intent to sell; to possess or transport in contravention of this Act; to traffic in for any consideration promised or obtained directly or indirectly.

(q) "Sell at wholesale" means selling to any other than to the intended consumer of malt, vinous or spirituous liquors. The words "sell at wholesale" shall not be construed to prevent a brewer or wholesale beer dealer from selling malt liquors to the intended consumer thereof.

. . . . .

(v) "License" means a grant to a licensee to manufacture or sell malt, vinous or spirituous liquors as provided by this Act.

#### SECTION 19. Regulation and Control of Licensing.

For the purpose of regulation and controlling the licensing of the manufacturing and sale of malt, vinous, and spirituous liquors, as provided by this Act, there is hereby created the State Licensing Authority. The said State Licensing Authority shall consist of the Secretary of State. For the purpose of the efficient administration of the duties of the said State Licensing Authority, as hereinafter set out, the Secretary of State shall be the chief administrative officer, and the offices of the Secretary of State shall be the offices of the State Licensing Authority for the transaction of the business of the State Licensing Authority. The State Licensing Authority, with the approval of the Executive Council, may employ such clerks and inspectors, as may be determined to be necessary. The necessary expenses of said State Licensing Authority, and the salaries and expenses of the other employees, where here provided, shall be approved and fixed by the Executive Council.

. . . . .

SECTION 29. Licenses. For the purpose of regulating the manufacture and sale of malt, vinous or spirituous liquors, the State Licensing Authority may, in its discretion,

upon application in the prescribed form made to it, issue and grant to the applicant a license to manufacture, rectify or sell malt, vinous and spirituous liquors of the following classes, subject to the provisions and restrictions of manufacture and sale as to manner, place and license fee and as otherwise provided by this Act:

- (a) Manufacturer's Liquor License
- (b) Wholesaler's Liquor License
- (c) Wholesaler's Beer License
- (d) Retail Liquor Store License
- (e) Liquor Licensed Drug Store
- (f) Beer and Wine License
- (g) Hotel and Restaurant License
- (h) Club License

. . . . .

**SECTION 31. Wholesaler's Liquor License.**

(a) Wholesaler's Liquor License. Every person selling vinous or spirituous liquors at wholesale shall pay to the State Treasurer an annual license fee of One Thousand Dollars (\$1,000.00) payable in advance.

(b) . . .

(c) Said license or licenses shall entitle the licensee or licensees to:

(1) Maintain and operate two warehouses and one sales room in this State to handle products so described in the above license or licenses, the same to be denominated a Wholesale Wine and Liquor Store or a Wholesale Beer Store or both, if required licenses have been provided.

(2) Take orders for vinous and spirituous liquors at any place and deliver vinous and spirituous liquors on orders previously taken to any place, provided the said license

has procured a Wholesale Wine and Liquor License, provided further, that the place where orders are taken and delivered is a place regularly licensed pursuant to the provisions of this Act.

(3) \* \* \*

(4) \* \* \*

**SECTION 32. Retail Liquor Store License.** Retail liquor stores as defined in this Act shall be licensed only to sell malt, vinous and spirituous liquors in sealed containers not to be consumed at the place where sold. Malt, vinous and spirituous liquors in sealed containers shall not be sold at retail other than in retail liquor stores, except as provided in Section 18-A of this Act.

\* \* \* \* \*

**SECTION 38. Excise Tax.** (a) An excise tax of three cents (3c) per gallon or fraction thereof on all malt liquors, three cents per quart or fraction thereof on all vinous liquors containing 14% or less of alcohol, and six cents per quart or fraction thereof on all vinous liquors containing more than 14% of alcohol by volume, and twenty cents per pint or fraction thereof on all spirituous liquors is hereby imposed, and shall be collected on all such respective liquor sold, offered for sale, or used in this State; provided, that upon the same liquors only one such tax shall be paid in this State. The manufacturer thereof, or the first licensee receiving alcoholic liquors in this State, if shipped from without the State, shall be primarily liable for such tax; provided, further, that if such liquor shall be transported by a manufacturer or wholesaler to a point or points outside of the State, and there disposed of, then in such event such manufacturer or wholesaler, upon the filing with the State Licensing Authority of a duplicate bill of lading or affidavit showing such transaction, the tax provided herein shall not apply to such liquor, and if already paid, shall be refunded to the manufacturer or wholesaler.

(b) The excise tax herein provided for shall be paid to the State Treasurer immediately upon delivery of the stamps, as provided for herein.

(c) All alcoholic liquors manufactured in this State, or sold therein, shall bear on the said container or containers, an excise stamp to be provided by the State Licensing Authority, which said stamp shall be affixed to all alcoholic liquors manufactured within this State by the manufacturer thereof before sale, or before being offered for sale, and all alcoholic liquors imported into the State immediately, upon entry therein, be affixed with the said excise stamp before being sold or offered for sale within the said State, and in accordance with the rules and regulations which may be promulgated by the State Licensing Authority, and provided also that all alcoholic liquors within the State, on the effective date of this Act, shall within a reasonable time thereafter, bear an excise stamp in the proper amount as provided herein.

(d) • • •

(e) The State Licensing Authority, after public hearing, of which the licensee shall have due notice as heretofore provided in this Act, shall suspend or revoke any license heretofore issued hereunder for a failure to pay any excise tax required by this Act, and may suspend or revoke such license for a violation of or for a failure to comply with the rules and regulations promulgated by said State Licensing Authority.

(f) • • •

SECTION 40. Disposition of Funds. The expenses of the State Licensing Authority shall be paid out of the funds and moneys collected from all license fees and excise taxes payable to the State Treasurer as provided by this Act, but the expenses of the office of State Licensing Authority shall not exceed five per cent of the sums or moneys so collected. All of the balance of said fees and excise taxes shall be

credited, distributed and paid to the Old Age Pension Fund in the manner now provided by law.

Of the funds and moneys collected from all license fees payable to the treasurer of any city, town, city and county or county, as provided by this Act, said city, town, city and county or county, may retain all of said license fees collected and paid to said licensing authority of said city, town, city and county, or county, to be credited to the respective general funds thereof.

SECTION 41. Violations and Penalty. Any person violating any of the provisions of this Act, or any of the rules and regulations authorized and adopted under it shall be deemed guilty of a misdemeanor and upon conviction shall be fined in the sum of not more than Five Thousand Dollars (\$5,000.00) for each offense, or may be punished by confinement in the county jail for a term of not more than one year, or by both such fine and imprisonment, and the court trying such offense may decree that any license theretofore issued under the provisions of this Act or of any law relating to the sale of malt, vinous or spirituous liquors to such person operating the place of business in which said offense was committed be revoked, and may decree that no license for the sale of malt, vinous or spirituous liquors shall ever thereafter be issued to any such person convicted of such violation.

The penalties provided in this section shall not be affected by the penalties provided in any other section or sections of this Act but shall be construed to be in addition to any and all other penalties.

• • • • •

SECTION 45.

- (a) • • •
- (b) • • •
- (c) • • •



(d) There shall be no property rights of any kind whatsoever in any alcoholic liquors, vessels, appliances, fixtures, bars, furniture, implements, wagons, automobiles, trucks, vehicles, contrivances, or any other things or devices used in or kept for the purpose of violating any of the provisions of this Act.

. . . . .

SECTION 48. This Act shall be known and may be cited as the "Liquor Code of 1935."

**OFFICIAL RULES AND REGULATIONS PROMULGATED BY THE  
COLORADO STATE LICENSING AUTHORITY FOR ADMINIS-  
TRATION OF THE COLORADO LIQUOR CODE.**

**REGULATION No. 1.**

Sec. 3. All malt, vinous and spirituous liquors sold or transferred within the State of Colorado must be affixed with the proper stamps before sale or transfer. Manufacturers, rectifiers and the first licensee receiving liquor within the State are primarily liable for the excise tax. Manufacturers and rectifiers shall affix the proper stamps to all liquors sold by them within this State to wholesalers, retailers or consumers prior to delivery. Wholesalers shall affix the proper stamps upon all liquors sold by them within this State to retailers or consumers prior to delivery. Manufacturers, rectifiers and wholesalers shall not affix stamps to liquor sold for resale or delivery outside the State of Colorado, but shipments of liquor sold for resale or delivery outside the State of Colorado must be accompanied by an inspection permit upon a form to be issued by the State Licensing Authority.

**REGULATION No. 12.**

Sec. C. It is hereby required that all alcoholic liquors and fermented malt beverages shall be the sole and exclusive property of and subject to the unrestricted power of disposal of a duly licensed Colorado wholesale liquor dealer

as defined in Section 17 of Chapter 142 or Section 5 (2) of Chapter 82, Session Laws of Colorado of 1935 at the time such liquors and malt beverages *cross the Colorado State line and are imported into this State for the purpose of being sold, offered for sale or used in this State.* (Italics are ours.) (Promulgated December 31, 1937.)

# SUPREME COURT OF THE UNITED STATES.

Nos. 523-530.—OCTOBER TERM, 1944.

The United States of America, Petitioner,  
523 *vs.*

Frankfort Distilleries, Inc.

The United States of America, Petitioner,  
524 *vs.*

National Distillers Products Corporation.

The United States of America, Petitioner,  
525 *vs.*

Brown Forman Distillers Corporation.

The United States of America, Petitioner,  
526 *vs.*

Hiram Walker, Incorporated.

The United States of America, Petitioner,  
527 *vs.*

Schenley Distillers Corporation.

The United States of America, Petitioner,  
528 *vs.*

Seagram-Distillers Corporation.

The United States of America, Petitioner,  
529 *vs.*

McKesson & Robbins, Incorporated.

The United States of America, Petitioner,  
530 *vs.*

J. E. Speegle.

On Writs of Certiorari to the United States Circuit Court of Appeals for the Tenth Circuit.

[March 5, 1945.]

Mr. Justice BLACK delivered the opinion of the Court.

Respondents are producers, wholesalers, and retailers, of alcoholic beverages, who were indicted in a federal district court for having conspired and combined to restrain commerce in violation of Sec. 1 of the Sherman Act as amended. 26 Stat. 209; 50 Stat.

693. Their demurrers and motion to quash having been overruled, respondents pleaded *nolo contendere* to one count of the indictment. On these pleas they were adjudged guilty by the District Court and fined. 47 F. Supp. 160. The Circuit Court of Appeals reversed, on the ground that the indictment failed to show that the conspiracy charged was in restraint of interstate commerce. 144 F. 2d 824. The importance of the questions involved prompted us to grant certiorari.<sup>1</sup>

The indictment alleged that 98% of the spiritous liquors and 80% of the wines consumed in Colorado were shipped there from other states. The annual shipments into the state were 1,150,000 gallons of liquors and 800,000 gallons of wine. Seventy-five per cent of these beverages were handled by the defendant wholesalers. Respondents were charged with conspiring, in violation of the Sherman Act, to raise, fix and maintain the retail prices of all these beverages by raising, fixing, and stabilizing retail markups and margins of profit.

To accomplish the objects of the conspiracy, it is alleged that they adopted the following course of action. All of the respondents agreed amongst themselves to (1) discuss, agree upon and adopt arbitrary non-competitive retail prices, markups, and margins of profit; (2) defendant retailers and wholesalers agreed to persuade and compel producers to enter into fair trade contracts on every type and brand of alcoholic beverage shipped into the state, thereby to establish arbitrarily high and non-competitive retail markups and margins of profit, agreed upon by defendants; (3) the retailers were to prepare and adopt forms of fair trade contracts, and agree with producers and wholesalers upon these forms; (4) a boycott program was adopted by all of the defendants under which retailers would refuse to buy any of the beverages sold by wholesalers or producers who refused to enter into or enforce compliance with the terms of the price fixing agreements, and non-complying retailers would be denied an opportunity to buy the goods of the defendant producers and wholesalers. Machinery was set up to make the boycott program effective.

The facts alleged in the indictment, which stand admitted on demurrer, and on the plea of *nolo contendere*, indicate a pattern which bears all the earmarks of a traditional restraint of trade. The participants are producers, middlemen, and retailers. They have agreed among themselves to adopt a single course in making

contracts of sale and to boycott all others who would not adopt the same course.

The effect, and if it were material, the purpose of the combination charged, was to fix prices at an artificial level. Such combinations, affecting commerce among the states, tend to eliminate competition, and violate the Sherman Act per se. *United States v. Socony Vacuum Co.*, 310 U. S. 150, 223-224. Price maintenance contracts fall under the same ban, *Ethyl Gasoline Corp. v. United States*, 309 U. S. 436, 458, except as provided by the 1937 Miller-Tydings Amendment to the ~~Sherman~~ Act. 50 Stat. 693. The combination charged against respondents does not fall within this exception. It permits the seller of an article which bears his trade mark, brand, or name, to prescribe a minimum resale price by contract, if such contracts are lawful in the state where the resale is to be made and if the trademarked article is in free and open competition with other articles of the same commodity. This type of "Fair Trade" price maintenance contract is lawful in Colorado. Session Laws of Colorado, 1937, Chap. 146. But the Miller-Tydings Amendment to the Sherman Act does not permit combinations of business men to coerce others into making such contracts, and Colorado has not attempted to grant such permission. Both the federal and state "Fair Trade" Acts expressly provide that they shall not apply to price maintenance contracts among producers, wholesalers and competitors. It follows that whatever may be the rights of an individual producer under the Miller-Tydings Amendment to make price maintenance contracts or to refuse to sell his goods to those who will not make such contracts, a combination to compel price maintenance in commerce among the states violates the Sherman Act. *United States v. Bausch & Lomb Co.*, 321 U. S. 707, 719-723. *United States v. Univis Lens Co.*, 316 U. S. 241, 252-253. Consequently, respondents were properly convicted, unless as they argue, their conduct is not covered by the Sherman Act, either because the price fixing applied only to retail sales which were wholly intrastate, or because the state's power to control the liquor traffic within its boundaries makes the Sherman Act inapplicable.

These two questions thus posed relate to the extent of the Sherman Act's application to trade restraints resulting from actions which take place within a state. In resolving them, there is an obvious distinction to be drawn between a course of conduct wholly within a state and conduct which is an inseparable ele-

ment of a larger program dependent for its success upon activity which affects commerce between the states. It is true that this Court has on occasion determined that local conduct could be insulated from the operation of the Anti-Trust laws on the basis of the purely local aims of a combination, insofar as those aims were not motivated by the purpose of restraining commerce, and where the means used to achieve the purpose did not directly touch upon interstate commerce. The cases relied upon by respondents<sup>2</sup> fall within this category. All of them involved the application of the Anti-Trust laws to combinations of businessmen or workers in labor disputes, and not to interstate commercial transactions. On the other hand, the sole ultimate object of respondents' combination in the instant case was price fixing or price maintenance. And with reference to commercial trade restraints such as these, Congress, in passing the Sherman Act, left no area of its constitutional power unoccupied; it "exercised all the power it possessed." *Apex Hosiery Co. v. Leader*, 310 U. S. 465, 495.

The fact that the ultimate object of the conspiracy charged was the fixing or maintenance of local retail prices, does not of itself remove it from the scope of the Sherman Act; retail outlets have ordinarily been the object of illegal price maintenance.<sup>3</sup> Whatever was the ultimate object of this conspiracy, the means adopted for its accomplishment reached beyond the boundaries of Colorado. The combination concerned itself with the type of contract used in making interstate sales; its coercive power was used to compel the producers of alcoholic beverages outside of Colorado to enter into price maintenance contracts. Nor did the boycott used merely affect local retail business. Local purchasing power was the weapon used to force producers making interstate sales to fix prices against their will. It may be true, as has been argued, that under Colorado law, retailers are prohibited from buying from out-of-state producers, but this fact has no relevancy. The power of retailers to coerce out-of-state producers can be just as effectively exercised through pressure brought to bear upon wholesalers as though the retailers brought such pressure to bear

<sup>2</sup> *Industrial Association of San Francisco v. United States*, 268 U. S. 64; *Levering & Garrigues Co. v. Morrin*, 289 U. S. 103; *United Leather Workers v. Herkert & Meisel Trunk Co.*, 265 U. S. 457; cf. *Local 167 v. United States*, 291 U. S. 293, 297 and *United States v. Hutcheson*, 312 U. S. 219.

<sup>3</sup> See, e. g., *Dr. Miles Medical Co. v. Park & Sons Co.*, 220 U. S. 373, 404; *Ethyl Gasoline Corp. v. United States*, 309 U. S. 436; *United States v. Univis Lens Co.*, 316 U. S. 241, 244, 245.

directly upon the producers. And combinations to restrain, by a boycott of those engaged in interstate commerce, through such indirect coercion is prohibited by the Sherman Act.<sup>4</sup>

It is argued that the Twenty-first Amendment to the Constitution bars this prosecution. That Amendment bestowed upon the states broad regulatory power over the liquor traffic within their territories.<sup>5</sup> It has not given the states plenary and exclusive power to regulate the conduct of persons doing an interstate liquor business outside their boundaries. Granting the state's full authority to determine the conditions upon which liquor can come into its territory and what will be done with it after it gets there, it does not follow from that fact that the United States is wholly without power to regulate the conduct of those who engage in interstate trade outside the jurisdiction of the State of Colorado.

The Sherman Act is not being enforced in this case in such manner as to conflict with the law of Colorado. Those combinations which the Sherman Act makes illegal as to producers, wholesalers and retailers are expressly exempted from the scope of the Fair Trade Act of Colorado, and thus have no legal sanction under state law either.<sup>6</sup> We therefore do not have here a case in which the Sherman Act is applied to defeat the policy of the state. That would raise questions of moment which need not be decided until they are presented. The judgment of the Circuit Court of Appeals is reversed and that of the District Court is affirmed.

**It is so ordered.** ~~Reversed~~

The CHIEF JUSTICE took no part in the consideration or decision of this case.

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<sup>4</sup> Fashion Originators' Guild v. Federal Trade Commission, 312 U. S. 457, 465; Loewe v. Lawlor, 208 U. S. 274.

<sup>5</sup> Carter v. Virginia, 321 U. S. 131; Ziffrin, Inc. v. Reeves, 308 U. S. 132, 138; Young's Market Co., 229 U. S. 59.

<sup>6</sup> The Colorado Fair Trade Act, 1937 Col. Session Laws, Ch. 146, provides that under certain conditions sellers of commodities can contract with buyers not to resell, and to require subsequent purchasers not to resell, at less than the minimum price stipulated by the seller. But that Act specifically provides that it shall not apply to horizontal agreements, "to any contract or agreement between or among producers or between or among wholesalers or between or among retailers as to sale or resale price." The Colorado Unfair Practices Act, 1941 Col. Session Laws, Ch. 227, amending and reenacting 1937 Col. Session Laws, Ch. 261, makes it unlawful to sell goods below cost to injure or destroy competition, and states that the express purpose of the Act is "to safeguard the public against . . . monopolies and to foster and encourage competition."



Mr. Justice FRANKFURTER, concurring.

The Twenty-first Amendment made a fundamental change, as to control of the liquor traffic, in the constitutional relations between the States and national authority. Before that Amendment—disregarding the interlude of the Eighteenth Amendment—alcohol was for constitutional purposes treated in the abstract as an article of commerce just like peanuts and potatoes. As a result, the power of the States to control the liquor traffic was subordinated to the right of free trade across state lines as embodied in the Commerce Clause. The Twenty-first Amendment reversed this legal situation by subordinating rights under the Commerce Clause to the power of a State to control, and to control effectively, the traffic in liquor within its borders. The course of legal history which made necessary the Twenty-first Amendment in order to permit the States to control the liquor traffic, according to their notions of policy freed from the restrictions upon state power which the Commerce Clause implies as to ordinary articles of commerce, was summarized in my concurring opinion in *Carter v. Virginia*, 321 U. S. 131, 139.

As a matter of constitutional law, the result of the Twenty-first Amendment is that a State may erect any barrier it pleases to the entry of intoxicating liquors. Its barrier may be low, high, or insurmountable. Of course, if a State chooses not to exercise the power given it by the Twenty-first Amendment and to continue to treat intoxicating liquors like other articles, the operation of the Commerce Clause continues. Since the Commerce Clause is subordinate to the exercise of state power under the Twenty-first Amendment, the Sherman Law, deriving its authority from the Commerce Clause, can have no greater potency than the Commerce Clause itself. It must equally yield to state power drawn from the Twenty-first Amendment. And so, the validity of a charge under the Sherman Law relating to intoxicating liquors depends upon the utilization by a State of its constitutional power under the Twenty-first Amendment. If a State for its own sufficient reasons deems it a desirable policy to standardize the price of liquor within its borders either by a direct price-fixing statute or by permissive sanction of such price-fixing in order to discourage the temptations of cheap liquor due to cutthroat competition, the Twenty-first Amendment gives it that power and the Commerce Clause does not gainsay it. Such state policy can not offend the Sherman Law even though distillers or middlemen agree with local dealers to respect this policy. If an agreement

among local dealers not to buy liquor through channels of interstate commerce does not offend the Sherman Law though a like agreement as to other commodities would, an agreement among liquor dealers to abide by state policy for a uniform price—which is far less restrictive of interstate commerce than a comprehensive boycott—can hardly be a violation of the Sherman Law.

Thus the question in this case, as I see it, is whether in fact the policy of Colorado sanctions such an arrangement as the indictment charges. Such a policy may be expressed either formally by legislation or by implied permission. Unless state policy is voiced either by legislation or by state court decisions, it is precarious business for an outsider to be confident about the legal policy of a State. So far as our attention has been called to materials relevant for ascertaining the policy of Colorado toward such a price arrangement as is here charged, it would be temerarious to suggest that Colorado does sanction it. Indeed, the legislation of Colorado looks in the opposite direction. And we have no guidance from state decisions to suggest that the apparent condemnation of such an arrangement under the Colorado Fair Trade Act, § 2, Colo. Stat. Ann., ch. 165, § 20(2), does not condemn the price arrangements before us. Although the Attorney General of Colorado has filed a brief as *amicus curiae* on the side of the respondents, his argument is not based on the contention that the policy of Colorado sanctions that which it is claimed the Sherman Law forbids. In the view I take of the matter, if a State authorized the transactions here complained of, the Sherman Law could not override such exercise of state power. For in any event, if state policy did so authorize it, conformity with the state policy could not be deemed an “unreasonable” restraint of interstate commerce. But I do not find that Colorado has done so.

The decision of the court below is not without support in what has been said in the past in holding that, apart from the Twenty-first Amendment, this was a restraint local in its nature and therefore outside the scope of the Sherman Law. But, price-fixing is such an immediate restraint upon trade that I do not think that the reach of the consequences of such an obvious restraint should be determined by drawing too nice lines as a matter of pleading. The case is before us, in effect, on demurrer to the indictment and judged abstractly, as a matter of pleading, I cannot say that the indictment was demurrable.

Mr. Justice ROBERTS concurs in this opinion.